Missouri Attorney General's Opinions - 1985

Opinion	Date	Topic	Summary
1-85	Mar 21		Opinion letter to The Honorable Roger Wilson
2-85	Feb 1		Opinion letter to Mary-Jean Hackwood
3-85	Feb 1		Opinion letter to Mary-Jean Hackwood
5-85	Sept 5	SCHOOL FUNDS. STATE FUNDS. STATE TREASURER. TAXATION - SALES. TAXATION - SCHOOLS.	Sections 144.700 and 144.701, RSMo Supp. 1984, require all revenue derived from tax money deposited in the School District Trust Fund, Section 144.701, RSMo Supp. 1984, including interest derived from such fund, to be credited to the School District Trust Fund and distributed in the manner provided by Section 163.087, RSMo Supp. 1984.
6-85	Jan 24		Opinion letter to The Honorable John L. Goldman
7-85	Sept 6		Opinion letter to Paul R. Ahr, Ph.D., M.P.A.
8-85	Feb 1	DEPARTMENT OF CORRECTIONS. JUDICIAL PAROLES. PAROLE. PROBATION. SUSPENDED SENTENCES.	The Board of Probation and Parole has the power to parole individuals committed to an institution under Sections 195.200.1(3) and 195.200.1(5), RSMo Supp. 1984, in that the prohibition against granting parole, probation, suspended sentences, or other forms of judicial clemency contained in Section 195.200.8, RSMo Supp. 1984, apply only to the Judiciary.
9-85	Feb 1		Opinion letter to The Honorable Robert T. Johnson
11-85	Jan 21		Opinion letter to The Honorable Carl M. Koupal, Jr.
12-85			Withdrawn
13-85	Feb 14		Opinion letter to The Honorable Weldon W. Perry, Jr.
14-85	Feb 14		Opinion letter to The Honorable Marvin E. Proffer
16-85			Withdrawn
17-85	Feb 22	CITIES OF THIRD CLASS. CITIES, TOWNS, AND VILLAGES.	(1) Third class cities under the mayor-council form of government pursuant to Chapter 77, RSMo 1978 and RSMo Supp. 1984, may provide fire protection services outside the city limits, so long as the safety, health, welfare, property, or commerce of the inhabitants of the city are benefited thereby; and (2) such cities may enter into mutual aid agreements with "voluntary" fire service organizations, so long as the safety, health, welfare, property, or commerce of the inhabitants of the city are benefited thereby.

20-85	Mar 11	DEPARTMENT OF CORRECTIONS.	Subsection 3 of Section 217.425, RSMo Supp. 1984, does not grant circuit judges, sheriffs and prosecuting or circuit attorneys a right to veto inmate furloughs granted by the Director of the Division of Adult Institutions of the Missouri Department of Corrections and Human Resources or his designee.
21-85	Feb 22		Opinion letter to The Honorable Gary E. Stevenson
22-85	Feb 1		Opinion letter to Eugene J. Feldhausen
23-85	Feb 14		Opinion letter to The Honorable Edwin Dirck
24-85	May 28		Opinion letter to John A. Pelzer
25-85	Mar 11		Opinion letter to The Honorable William J. Fleischaker
26-85	Feb 14		Opinion letter to The Honorable Roger Wilson
27-85	July 11		Opinion letter to The Honorable Anthony D. Ribaudo
31-85	Mar 15		Opinion letter to The Honorable J. R. Strong
33-85	Feb 22		Opinion letter to The Honorable Fred Dyer
34-85	Apr 23	CIRCUIT CLERK AND EX OFFICIO RECORDER OF DEEDS. CIRCUIT CLERK. CIRCUIT COURT - CIRCUIT COURTS. CIRCUIT COURT CLERK AND RECORDER OF DEEDS. LEGAL EXPENSE FUND. BONDS.	(1) Elected circuit clerks other than the Circuit Clerk of the City of St. Louis are under the provisions of the State Legal Expense Fund; (2) the Circuit Clerk of the City of St. Louis, the Circuit Clerk of St. Louis County, and the Court Administrator of Jackson County are not under the provisions of the State Legal Expense Fund; (3) circuit clerks ex officio recorders of deeds are under the provisions of the State Legal Expense Fund except to the extent that they are performing duties as recorders of deeds; (4) deputy and division clerks are under the provisions of the State Legal Expense Fund to the extent that they are performing duties on behalf of the State and not recorder of deeds functions; (5) claims involving a circuit clerk's bond are not covered by the State Legal Expense Fund; (6) the ultimate question of whether coverage is provided any State officer or State employee depends on the facts of the particular case.
35-85	Mar 15		Opinion letter to The Honorable Marvin E. Proffer
40-85	Mar 11		Opinion letter to The Honorable Robert J. Seek
41-85	Mar 21	EMBRYO TRANSFERS.	Nonsurgical embryo transfers in animals involves acts which constitute

		MISSOURI VETERINARY MEDICAL BOARD. VETERINARIAN. VETERINARY MEDICINE.	the practice of veterinary medicine and requires knowledge of veterinary medicine and such acts may only be performed in Missouri by one who is licensed by the Missouri Veterinary Medical Board under Chapter 340, RSMo 1978 and Supp. 1984, unless such person is exempt from such licensing requirement by Section 340.020, RSMo 1978, or any other applicable exemption from Chapter 340, RSMo 1978 and Supp. 1984.
44-85	Mar 25		Opinion letter to The Honorable Sue Shear
46-85	Mar 25		Opinion letter to The Honorable John E. Scott
47-85	Mar 21		Opinion letter to The Honorable Travis Morrison
50-85	Apr 11		Opinion letter to Carl M. Koupal, Jr.
51-85	May 14		Opinion letter to The Honorable Harry Wiggins
52-85	May 14		Opinion letter to Lee Roy Black, Ph.D.
53-85	Apr 1		Opinion letter to The Honorable James 'Jay' Russell and The Honorable Lester Patterson
54-85	Mar 21		Opinion letter to The Honorable Doug Harpool
60-85	May 28		Opinion letter to Carl M. Koupal, Jr.
61-85	Apr 1	COUNTY COURT. COUNTY COMMISSION. CONSTITUTIONAL LAW.	Under Section 49.010, RSMo Supp. 1984, effective January 1, 1985, the "County Court" became known as the "County Commission", and the county "Judges" became known as "Commissioners" of the county. "The Office of the Clerk of the County Court" became known as "The Office of the Clerk of the County Commission".
62-85	Apr 2		Opinion letter to Keith Birkes, Esq.
63-85	May 14		Opinion letter to The Honorable Margaret Kelly, CPA
65-85	May 14		Opinion letter to Larry R. Gale
66-85	July 11	TAXATION. MERCHANTS' AND MANUFACTURERS' REPLACEMENT TAX.	The "preceding year" referred to in Section 139.600.1, RSMo Supp. 1984, is a calendar year.
67-85	Apr 23		Opinion letter to The Honorable Irene Treppler and The Honorable Frank Bild
73-85	May 14		Opinion letter to Bill Smith
74-85	May 28		Opinion letter to Scott S. Sifferman
76-85	May 14		Opinion letter to The Honorable Wesley A. Miller

77-85	Apr 22		Opinion letter to Dr. Arthur L. Mallory
79-85	Apr 25		Opinion letter to The Honorable Dennis Smith
80-85	Nov 5		Opinion letter to Carl M. Koupal, Jr.
81-85	Nov 14	OPTOMETRISTS. PHARMACISTS. CONTROLLED SUBSTANCES. DRUGS. DEPARTMENT OF ECONOMIC DEVELOPMENT.	An optometrist certified pursuant to Section 336.220, RSMo Supp. 1984, to administer topically applied diagnostic pharmaceutical agents may also prescribe such diagnostic pharmaceutical agents, except controlled substances. Pharmacists licensed under Chapter 338, RSMo, may dispense drugs according to such prescriptions.
82-85	July 11		Opinion letter to The Honorable Margaret Kelly, CPA
84-85	July 11		Opinion letter to The Honorable Margaret Kelly, CPA
85-85	June 24		Opinion letter to Larry R. Gale
88-85	July 11		Opinion letter to The Honorable David L. Rauch
93-85			Withdrawn
95-85	June 27		Opinion letter to The Honorable Tom McCarthy
98-85	July 3	AIR CONSERVATION COMMISSION. DEPARTMENT OF PUBLIC SAFETY. AIR POLLUTION.	The gasoline inlet restrictor on motor vehicles is an air pollution control device.
100-85	Sept 6		Opinion letter to The Honorable Doug Harpool
108-85	Aug 22		Opinion letter to The Honorable Galen Browning
112-85	July 22		Opinion letter to The Honorable Margaret Kelly, CPA
113-85	July 22		Opinion letter to The Honorable William J. Icenogle
114-85	Aug 26		Opinion letter to Dr. Arthur L. Mallory
122-85	Oct 16	SCHOOL AID. SCHOOLS. TAXATION - PROPERTY. TAX RATE ROLLBACK.	After the general assessment tax rate reduction, school districts may not increase their tax levies above the "tax rate ceiling" without voter approval, as provided for in Section 137.073.7, as enacted by Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session. However, school districts will not be disqualified from receiving state aid under the Excellence in Education Act of 1985, Conference Committee Substitute No. 2 for Senate

			Committee Substitute for House Committee Substitute for House Bill No. 463, Eighty-Third General Assembly, First Regular Session, if they would have qualified for such aid but for the reduction required by Section 137.073 of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session.
124-85	Dec 31	CHILD ABUSE. FAMILY SERVICES, DIVISION OF. SOCIAL SERVICES, DEPARTMENT OF. YOUTH SERVICES, DIVISION OF.	Concerning the screening of child care providers and employees under Senate Bill 401, 83rd General Assembly, First Regular Session, Sections 210.150 and 210.800 to 210.837, RSMo Supp. 1985 , hospitals and public schools do not come within the definition of "provider" and are not subject to the screening and disqualification requirements; a nationwide criminal review will be done on employees of providers; public elementary and secondary schools may request examinations of the central registry; exemptions may be granted to employees of the divisions of Youth Services and Family Services; and related questions.
127-85	Sept 30		Opinion letter to Carl M. Koupal, Jr.
128-85	Dec 3		Opinion letter to Carl M. Koupal, Jr.
129-85	Sept 4		Opinion letter to Joseph J. O'Hara
132-85	Sept 3		Opinion letter to The Honorable Jean H. Mathews
136-85	Oct 24		Opinion letter to Frederick Brunner
140-85	Nov 15		Opinion letter to The Honorable John D. Wiggins
141-85	Dec 27	DEPARTMENT OF PUBLIC SAFETY. WATER PATROL.	Members of the Missouri State Water Patrol may randomly stop vessels on the waters of the State of Missouri for the purpose of checking registration papers and safety equipment without probable cause, except (1) prior to April 1, 1986, water patrolmen may not board vessels for inspection purposes during night-time hours, and (2) on or after April 1, 1986, water patrolmen may not board vessels for inspection purposes without probable cause to believe a provision of Chapter 306, RSMo, is being violated.
142-85			Withdrawn
144-85	Nov 8		Opinion letter to The Honorable Fred Williams
145-85	Oct 23		Opinion letter to John G. Meyer
149-85	Dec 17		Opinion letter to The Honorable Margaret Kelly, CPA
170-85	Dec 27		Opinion letter to The Honorable Roy Blunt

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

March 21, 1985

OPINION LETTER NO. 1-85

FILED
1

The Honorable Roger Wilson
Senator, District 19
State Capitol Building, Room 227
Jefferson City, Missouri 65101

Dear Senator Wilson:

This letter is in response to your request for an opinion on the following questions:

> Does the Cancer Commission have the power to enter into an affiliation agreement with a private, not-for-profit Missouri Corporation, which conducts cancer research, and designate that corporation to be officially known as the research arm for the State Cancer Center: (a) Additionally, may the corporation be authorized to act as the official agent and negotiating body for all federally and non-federally supported research grants, contracts, gifts, donations, letters, patents and royalties on the part of the State Cancer Center's staff and the corporation's staff; (b) What effect did the 1983 amendments to Chapter 200 have in your decision, in other words, could such an affiliation agreement as described above have been properly entered into by the Cancer Commission prior to the 1983 amendments to Chapter 200?

It is important at the outset to understand what is meant by "affiliation". Black's Law Dictionary, Fifth Edition (1981) defines "affiliation" as:

> Imports less than membership in an organization, but more than sympathy, and a working alliance to bring to fruition the proscribed program of a prescribed organization, as distinquished from mere cooperation with a prescribed organization in lawful activities, is essential. ...

Several Missouri court cases have discussed the nature of an "affiliation". In Baker v. Fenley, 128 S.W.2d 295, 298 (Mo.App. 1939) the court said in defining "affiliate":

> We do think that in order for such a relationship to exist that one body or person should have a financial interest, at least, in the other's business, or a voice in its management, to be either an affiliate or subsidiary.

Furthermore, an affiliation once established creates a contractual relationship. Local No. 218, Bakery and Confectionery Workers International Union of America v. Local No. __, American Bakery and Confectionery Workers International Union, 405 S.W.2d 917, 919 (Mo. 1966). It is also important to keep in mind that an "affiliation is not a merger, but both entities continue to exist as separate bodies or organizations. Missouri State Teachers Association v. St. Louis Suburban Teachers Association, 622 S.W.2d 745, 752 (Mo. App. 1981).

A recent federal decision also provides an important insight into an "affiliation". The Ninth Circuit in Travelers Indemnity Company v. United States of America, 543 F.2d 71, 76 (9th Cir. 1976) had to define the term "affiliated". The court said that such "envision[s] an intimate business relationship in which significant aspects of financial and managerial control of the insured and the affiliate or associate are integrated. More is required than common ownership and a limited sharing of facilities which aids each owner to pursue his independent and separate objectives." The United States Court of Appeals in that case discussed several other federal opinions which supported the Ninth Circuit's interpretation of "affiliate". Several Missouri statutes also include in the definition of "affiliate" a measure of control. See Sections 448.1-103(1), RSMo Supp. 1984,[1] and 382.010, RSMo 1978.

The General Assembly provided the Cancer Commission with the authority to enter into affiliation agreements with a limited variety of institutions for a limited purpose. Section 200.081 provides:

> The state cancer center may establish affiliation agreements between the center, other institutions, and research facilities for promoting a coordinated approach to cancer treatment, research, and medical education.

---

[1]All statutory references are to RSMo Supp. 1984, unless otherwise indicated.

Clearly, the Cancer Commission could enter into an affiliation agreement with a private, not-for-profit Missouri corporation which conducts cancer research under the authority of Section 200.081 for the purpose of conducting cancer research. While the Cancer Commission is authorized to enter into affiliation agreements for coordinated approaches to cancer research, it is doubtful whether it could designate any corporation as the State Cancer Center's official research arm, because of the general principle that public officials cannot delegate the duties and responsibilities which the law compels them to administer. This general principle will be discussed fully in answer to the second question concerning the ability to designate a corporation as an official agent for the State Cancer Center.

Additionally, the Cancer Commission could not enter into an affiliation agreement that failed to terminate after several years. In Opinion Letter No. 5, Dennis, 1983, this office concluded that a county memorial hospital could not enter into a ten-year contract with a physician for his services. Our office relied on Opinion No. 92, Volkmer, 1961, which concluded that a county court may lease property but not for a period ninety-nine years or even twenty years. Our office also addressed this issue in Opinion No. 304, Kiser, 1965, where we concluded that a county court may lease property for two or five years, but anything in excess of twenty-five years would be an unreasonable exercise of power. Therefore, an affiliation agreement which failed to provide for termination after several years would be an unreasonable exercise of power.

In response to your second question which concerns whether the corporation could be authorized to act as the official agent for the State Cancer Center for a variety of purposes, our office believes this would be an impermissible delegation of authority. In Opinion Letter No. 16, Doctorian, 1984, our office concluded that a county memorial hospital may not employ a corporation to manage the institution for them. Furthermore, in Opinion Letter No. 21, Strong, 1984, we concluded that a county hospital may not contract with a research management organization when such would be an impermissible delegation of governmental functions.

The State Cancer Commission is specifically authorized by Section 200.020.4 to "accept gifts, grants or other transfers of property of any sort on behalf of the state cancer center." Additionally, the Cancer Commission is authorized by Section 200.071 to establish procurement and purchasing procedures for the Center. Any agreement which deprived the Cancer Commission from being the negotiating body for the State Cancer Center for contracts would be an impermissible delegation of their express authority under Section 200.071. Furthermore, under Section 200.020.4, any such agreement would be an impermissible delegation of governmental functions where such a corporation was the official agent for all gifts and donations.

Furthermore, an affiliation agreement, as described, would create in the corporation the powers of a general agent. A general agent is one who is empowered to transact all business of his principal, or to transact all business of another of a particular kind, or in a particular place, or to do all acts connected with a particular business. State ex rel. M.F.A. Mutual Insurance Company v. Rooney, 406 S.W.2d 1, 4 (Mo. banc 1966). Clearly, the corporation would be a general agent as opposed to a special agent because the purpose of a special agent is generally for the accomplishment of a single transaction or a transaction with designated persons. Farm & Home Savings & Loan Association of Missouri v. Stubbs, 98 S.W.2d 320, 332 (Mo.App. 1936). The very fact that the corporation would be a general agent for the State Cancer Commission would be an impermissible delegation of powers because the acts of an agent, bind the principal. King v. Pearce, 40 Mo. 222, 223 (1867).

We understand your third question concerning the amendments in 1983 to Chapter 200, to be addressed to the exemption from the State Purchasing Law, Chapter 34, RSMo 1978 and Supp. 1984. In 1982, the State Cancer Commission was required to make their purchases for the Center in accordance with the State Purchasing Law. See Section 200.071, RSMo Supp. 1982 (repealed). However, in 1983, House Bill 549 amended Section 200.071 so that the State Cancer Center "shall be" exempt from Chapter 34. Our office concluded that the State Cancer Center was exempt from Chapter 34 in Opinion No. 102, Holt, 1983. However, an affiliation agreement which was entered into prior to the amendment to Section 200.071, which became effective on June 22, 1983, would be invalid if it violated Chapter 34.[2]

Section 34.030, RSMo 1978, sets out the duties of the Commissioner of Administration. It provides that the Commissioner of Administration shall purchase all supplies for all departments. Section 34.010.2, RSMo 1978, defines "department" to include commissions. Section 34.010.4, RSMo 1978, defines "supplies" to include contractual services. In Opinion No. 163, Nielsen, 1975,[3] our office concluded that the list of services in Section 34.010.1,

---

[2]Our office has concluded that there is an exception under Chapter 34 for the legal and medical professions, Opinion Letter No. 22, Mueller, 1980. The Commissioner of Administration had authority to authorize direct purchases under Section 34.100, RSMo 1978, and presently has such authority under Section 34.100, RSMo Supp. 1984

[3]We have not enclosed copies of the Attorney General opinions cited.

RSMo 1978, which is a definition of "contractual services", was not all-inclusive. In other words, in the absence of an exception such as presently exists, most other services would fall within the statutory definition even though they were not expressly set out therein.

The amendment to Section 200.071 in 1983 did not make an invalid agreement suddenly valid. Article I, Section 13, of the Missouri Constitution prohibits the enactment of any law which is retroactive in operation and affects individual rights. The General Assembly may pass retroactive laws that affect the state only, because there is no private interest involved. State ex rel. Meyer v. Cobb, 467 S.W.2d 854, 856 (Mo. 1971). In our view, Section 200.071 only addresses the future operation of the State Cancer Center and does not address the past, because the General Assembly did not manifest a clear intent that the statutory change apply retrospectively.

Therefore, the Cancer Commission does not have the authority to enter into an affiliation agreement for an unlimited period of time or which would designate a Missouri corporation as the official agent and negotiating body for grants, contracts, gifts and donations.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

WILLIAM L. WEBSTER
ATTORNEY GENERAL

Attorney General of Missouri

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

February 1, 1985

DIRECT DIAL: (314) 751-3321

OPINION LETTER NO. 2-85

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees' Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101

FILED
2

Dear Ms. Hackwood:

This opinion letter is in response to your questions asking:

> Does the benefit increase from 1 1/4% to 1 1/3% apply to the initial retirement benefit of retirees or is it to include any cost of living increases that have been received by the retirees?
>
> If your determination is that the increase is to be applied to the initial benefit amount, rather than the amount currently being received by a retiree, should the cost of living increase by Section[s] 104.415 and 104.612 be recalculated retroactively on the initial benefit payment and brought up to date or should the cost of living increases accrued to date be paid until such time the next cost of living adjustment is made?

Section 104.612.1 and .2, RSMo Supp. 1984, states:

> 1. Each special consultant employed or eligible for employment on May 12, 1981, by a board of trustees of a retirement system as provided in section 104.610 shall, in addition to duties prescribed in section 104.610, and upon request of the board of trustees, give the board, orally or in writing, a short detailed

statement on the problems of retirement under the current monthly benefits.

2. As compensation for the extra duty imposed by subsection 1 of this section, each special consultant shall receive, in addition to all other compensation provided by law, an increase in compensation each year, computed upon the total amount which the consultant received in the previous year from state retirement benefits, compensation under the provisions of section 104.610, and compensation under the provisions of this section, of eighty percent of the increase in the consumer price index calculated in the manner specified in section 104.415. Any such annual increase in compensation, however, shall not exceed five percent, nor be less than four percent, and the total increase in compensation to each special consultant pursuant to the provisions of this subsection shall not exceed fifty percent of the total retirement benefits and compensation he or she was receiving immediately prior to May 12, 1981.

Section 104.415, RSMo Supp. 1984, states:

1. Each member who retires on or after May 12, 1981, shall receive each year an increase in the amount of benefits received by the member during the preceding year of eighty percent of the increase in the consumer price index calculated in the manner hereinafter provided. Such annual benefit increase, however, shall not exceed five percent, nor be less than four percent, and the total increase in the amount of benefits received pursuant to the provisions of this subsection shall not exceed fifty percent of the initial benefit which the member received upon retirement.

2. For the purposes of this section, any increase in the consumer price index shall be determined by the board in February of each year, based upon the consumer price index for the preceding calendar year over the consumer price index for the calendar year immediately prior thereto. Any increase so determined shall

> be applied by the board in calculating any benefit increases that become payable under this section for the twelve-month period beginning with the March first immediately following such determination.
>
> 3. An annual increase, if any is due, shall be payable monthly beginning on a date specified by the board. Nothing in this section shall be construed to prohibit a member from waiving his right to receive the annual increase provided pursuant to this section. However, the waiver may not extend beyond the age permitted by the Tax Equity and Fiscal Responsibility Act (TEFRA). The waiver shall be final as to the annual increase waived.

As can be seen by these statutes, members of the Missouri State Employees' Retirement System ("MOSERS") who retire on or after May 12, 1981, receive a cost of living allowance ("COLA") as a part of their basic retirement benefits. Members of MOSERS who retired prior to May 12, 1981, receive the COLA as a part of their special consultant pay. Both COLAs are calculated in the same manner and are based on the amount received in the previous year from state retirement benefits.

Section 104.610.1, RSMo Supp. 1984, states:

> Any person, who is receiving or hereafter may receive state retirement benefits from the Missouri state employees' retirement system, a legislators' retirement system, or the highway employees' and highway patrol retirement system, upon application to the board of trustees of the system from which he or she is receiving retirement benefits, shall be made, constituted, appointed and employed by the board as a special consultant on the problems of retirement, aging, and other state matters, for the remainder of the person's life, and upon request of the board, or other state agencies where such person was employed prior to retirement, give opinions, and be available to give opinions in writing, or orally, in response to such requests, as may be required, and for such services shall be compensated monthly, in an amount, which, when added to any monthly state retirement benefits received initially on his retirement, shall be equal to

> the state retirement benefits the person would be receiving currently if he had benefited from changes in the law effecting increases in the rate in the formula for calculating benefits in his respective retirement system, for his type of employment, made subsequent to the date of his retirement; except that in calculating such benefits the meaning of "average compensation" shall be that ascribed to it by the law in effect on December 31, 1980. [Emphasis added.]

Such section provides retirees with special consultant pay in an amount equal to the state retirement benefits that person would be receiving currently if he or she had benefited from changes in the law effecting increases in the rate in the formula for calculating benefits in his respective retirement system.

Section 104.374.1, RSMo Supp. 1984, states:

> The normal annuity of a member, other than a member of the general assembly or a member who served in an elective state office, shall be an amount equal to one and one-third percent of the average compensation of the member multiplied by the number of years of creditable service of the member.

Prior to the enactment of Senate Committee Substitute for House Committee Substitute for House Bill No. 1370, 82nd General Assembly, Second Regular Session, the rate used to calculate the deferred normal annuity was one and one-fourth percent rather than one and one-third percent.

The calculation of the deferred normal annuity is dependent upon the "rate", the average compensation of the individual, and the number of years of creditable service. We believe that the special consultant compensation under the new version of Section 104.610 is calculated by merely substituting the "old rate" for the new one and one-third percent (1-1/3%) rate introduced by Section 104.374, RSMo Supp. 1984. One does not multiply the new one and one-third percent (1-1/3%) rate by any amount of accrued cost-of-living benefits. Such cost-of-living benefits are calculated separately under Sections 104.415 and 104.612, RSMo Supp. 1984.

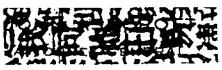
Accordingly, we conclude that the rate increase from one and one-fourth percent (1-1/4%) to one and one-third percent (1-1/3%) is applied to the calculation of the special consultant compensation provided by Section 104.610, RSMo Supp. 1984, without regard

to cost-of-living benefit adjustments. Cost-of-living benefit adjustments are calculated annually under Sections 104.415 and 104.612, RSMo Supp. 1984. Such cost-of-living benefit adjustments are not calculated retroactively.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

WILLIAM L. WEBSTER
ATTORNEY GENERAL



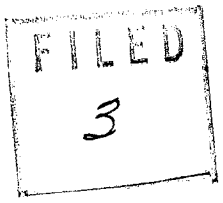
Attorney General of Missouri

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321
DIRECT DIAL:

February 1, 1985

OPINION LETTER NO. 3-85



Mary-Jean Hackwood
Executive Secretary
Missouri State Employees' Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101

Dear Ms. Hackwood:

This letter is in response to your question asking whether the minimum benefit adjustment under Section 104.615, RSMo Supp. 1984, is special consultant pay or part of the base benefit.

Section 104.615.1, RSMo Supp. 1984, states:

> Notwithstanding provisions of other sections of this chapter to the contrary, but subject to the provisions of subsection 2 of this section, the total monthly benefit payable, before any actuarial adjustments or payments of any consultant compensation, to a member of the state employees' retirement system or a member of the highways and transportation employees and highway patrol retirement system shall not be less than one hundred twelve dollars and fifty cents if such member has fifteen years or more of creditable service in his or her respective system; if such member has ten or more but less than fifteen years of creditable service in his or her respective system, the total monthly payment shall not be less than one hundred twelve dollars and fifty cents reduced by one-fifteenth for each year, or portion of a year, the member lacks having fifteen years of creditable service. Special consultants shall give an oral summary of opinions on aging, if so requested, as an extra duty for which additional compensation shall be paid as provided in this

> section. Any additional compensation payable to any member under the provisions of this section shall be consolidated with any other retirement benefits payable to such person and shall be paid from the general revenue fund of the state of Missouri, or any fund or funds, or from a combination or part of any fund or funds of the state of Missouri, pursuant to appropriations for such purpose. [Emphasis added.]

Section 104.615, RSMo Supp. 1983 (repealed by House Bill No. 1370, 82nd General Assembly, Second Regular Session), provided:

> The provisions of sections 104.374 to the contrary notwithstanding, [the total annuity of] any member of the state employees' retirement system, other than members and former members of the general assembly, and any member of the highway employees' and highway patrol retirement system, if such member of either system has fifteen years or more of creditable service; including compensation received for services as special consultant, shall not be less than one hundred twelve dollars and fifty cents per month, reduced by one-fifteenth for each year of creditable service for those retirees with ten years or more and less than fifteen years of creditable service. For purposes of benefits under the provisions of this section, "members" shall be considered and include special consultants[1] as provided in this chapter 104. Special consultants shall give an oral summary of opinions on aging if so requested as an extra duty for which additional compensation shall be paid as provided in this section. Any additional annuity of or compensation payable to any member under the provisions of this section shall be consolidated with any other retirement benefits payable to such person and shall be paid from the general revenue fund of the state of Missouri, or any fund or funds, or from a combination or part of any fund or funds

---

[1]This provision of Section 104.615, H.C.S.H.B. Nos. 835, 53, 591 and 830, 81st General Assembly, 1981, is identical to that contained in the section in 1979, S.B. 242, although there was an attempt to amend the language, without success, to omit the word "and" and submit in lieu thereof the word "to".

> of the state of Missouri, pursuant to appropriations for such purpose. [Emphasis added and revisor's note omitted.]

Prior to the enactment of the minimum benefit provision of S.B. 242, 1979 Mo. Laws 297, state retirees were not entitled to a minimum monthly benefit. In order to provide this minimum monthly benefit to state retirees who had retired prior to the enactment of S.B. 242, the minimum monthly benefit adjustment was made special consultant pay. See State ex rel. Dreer v. Public School Retirement System of the City St. Louis, 519 S.W.2nd 290 (Mo. 1975); State ex rel. Cleveland v. Bond, 518 S.W.2d 649 (Mo. 1975); State ex rel. Breshears v. Missouri State Employees' Retirement System, 362 S.W.2d 591 (Mo. banc 1962).

The first sentence of the new version of Section 104.615 indidates that the one hundred twelve dollars and fifty cents ($112.50) per month minimum monthly benefit is calculated "before any actuarial adjustments or payments of any consultant compensation, . . .". The plain meaning of these words is that the minimum monthly benefit is the base benefit before adding on any adjustments for consultant compensation. This implies that the minimum monthly benefit is the base benefit. However, the second sentence of the new version of Section 104.615 refers to special consultants who must give an oral summary of opinions on aging in order to be entitled to the additional compensation provided by Section 104.615, RSMo Supp. 1984. This indicates that some persons are receiving a minimum monthly benefit adjustment as consultant pay.

As we read Section 104.615, RSMo Supp. 1984, those members of the Missouri State Employees' Retirement System who retire on or after the effective date of Section 104.615, RSMo Supp. 1984, i.e., October 1, 1984, receive the minimum monthly benefit adjustment as a base benefit, if applicable. Those state retirees who retired prior to the October 1, 1984 effective date of Section 104.615, RSMo Supp. 1984, may continue to receive the minimum monthly benefit adjustment as special consultant pay.

Yours very truly,

WILLIAM L. WEBSTER
Attorney General

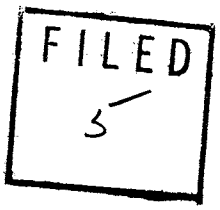
SCHOOL FUNDS:
STATE FUNDS:
STATE TREASURER:
TAXATION - SALES:
TAXATION - SCHOOLS:

Sections 144.700 and 144.701, RSMo Supp. 1984, require all revenue derived from tax money deposited in the School District Trust Fund, Section 144.701, RSMo Supp. 1984, including interest derived from such fund, to be credited to the School District Trust Fund and distributed in the manner provided by Section 163.087, RSMo Supp. 1984.

September 5, 1985

OPINION NO. 5-85

Arthur L. Mallory, Ph.D.
Commissioner of Education
Post Office Box 480
Jefferson City, Missouri 65102



Dear Dr. Mallory:

This opinion is in response to your question asking:

> Should interest earned on money in the School District Trust Fund as defined in Section 144.701, RSMo, be deposited to the School District Trust Fund and distributed in accordance with Section 163.087, RSMo?

Section 144.700.1, RSMo Supp. 1984, states:

> All revenue received by the director of revenue from the tax imposed by sections 144.010 to 144.430 and 144.600 to 144.745, except that revenue derived from the rate of one cent on the dollar of the tax which shall be held and distributed in the manner provided in section 144.701, shall be deposited in the state general revenue fund, including any payments of the taxes made under protest. [Emphasis added.]

Section 144.701, RSMo Supp. 1984, states:

> The revenue derived from the rate of one cent on the dollar of the tax imposed by sections 144.010 to 144.430 and sections 144.600 to 144.745 which shall be deemed to be local tax revenue, shall be deposited by the state

> treasurer in a special trust fund, which is hereby created, to be known as the "School District Trust Fund". The money in the fund shall be distributed to the public school districts of the state in the manner provided in section 163.087, RSMo, and shall be appropriated and used for no other purpose; except that, of all refunds made of taxes collected under the provisions of sections 144.010 to 144.430 and sections 144.600 to 144.745, the appropriate percentage of any refund shall be paid from the school district trust fund, and except that the state may retain a fee as a charge for collecting and disbursing moneys so deposited, and transfers may be made from the fund as provided in section 164.013, RSMo. The state collection fee shall not exceed two and one-half million dollars or one percent of the amount deposited in the fund, whichever is less. The fee shall be negotiated annually through the appropriation process. Any balance remaining in the fund at the end of an appropriation period shall not be transferred to general revenue, and the provisions of section 33.080, RSMo, shall not apply to the fund. Moneys in the trust fund shall be invested by the state treasurer in the same deposits and obligations in which state funds are authorized by law to be invested, except that the deposits and obligations shall mature and become payable in time for distribution of the funds as provided in section 163.087, RSMo. [Emphasis added.]

Section 163.087, RSMo Supp. 1984, states:

> 1. Money in the school district trust fund shall be distributed to each six-director, including special districts, urban and metropolitan school district in the state in the same ratio that the number of eligible pupils in the district bears to the total number of eligible pupils in all such school districts for the preceding year. As used in the preceding sentence, the term "eligible pupils" has the meaning ascribed to it in section 163.011. In addition, each such district which is providing an approved program for pupils residing on federal lands shall receive an amount which shall be determined as follows:

An eligible pupil count for pupils residing on federal lands shall be calculated separately for the district in the manner provided in section 163.011, treating such pupils as residents of the district for this purpose. Such eligible student count shall be multiplied by one-half of the amount to be received by the district per eligible pupil not residing on federal lands.

2. Money in the fund shall be distributed monthly on or before the fifteenth day of each month. The state board of education shall certify the amounts to be distributed to the several school districts to the commissioner of administration who shall issue the warrants therefor.

3. Money received by a school district from the school district trust fund shall be deemed to be local tax revenue derived for the same fiscal year in which the money is received, for the teachers, incidental and building funds, and may be deposited to such funds of the district in such proportions as the school board determines provided a minimum of seventy-five percent of one-half of such funds received shall be deposited in the teachers fund. The reduction in the operating levy pursuant to section 164.013, RSMo, shall be made proportionally in the funds where the remaining one-half of the money from the school district trust fund is deposited. In the calculation of state aid for the district under the provisions of section 163.031, fifty-seven percent of one-half the amount received by the district in the first preceding year shall be deducted from the minimum guarantee in the same manner that is prescribed in such section for deduction from the amounts received by the district from fines, forfeitures, escheats and intangible taxes. [Emphasis added in part.]

Article IV, Section 15, Missouri Constitution, states in part:

The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns

> therefrom shall belong to the state. Immediately on receipt thereof the state treasurer shall deposit all moneys in the state treasury to the credit of the state in banking institutions selected by him and approved by the governor and state auditor, and he shall hold them for the benefit of the respective funds to which they belong and disburse them as provided by law. . . . No duty shall be imposed on the state treasurer by law which is not related to the receipt, investment, custody and disbursement of state funds. [Emphasis added.]

Section 30.240, RSMo Supp. 1984, states in part:

> Unless otherwise provided by law, all yield, interest, income, increment, or gain received from the time deposit of state moneys or their investment in obligations of the United States government shall be credited by the state treasurer to the general revenue. [Emphasis added.]

The "[u]nless otherwise provided by law" language of this statute was added by C.C.S.S.B. 497, 1982 Missouri Laws 650, possibly to ensure that interest earned on the Crime Victims' Compensation Fund be credited to that fund, see Section 595.045.4, RSMo Supp. 1984. Cf. Section 110.150.2, RSMo Supp. 1984 (county depositary law).

In State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers' College, 305 Mo. 57, 264 S.W. 698 (Banc 1924), the court stated:

> By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state moneys means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. Id., at 700.

See also the definitions of the term "revenue" found in Buechner v. Bond, 650 S.W.2d 611, 613 (Mo.Banc 1983), and State Highway Commission v. Spainhower, 504 S.W.2d 121, 127 (Mo. 1973).

Sections 144.700.1 and 144.701, RSMo Supp. 1984, require the deposit of the "Proposition C" moneys by the State Treasurer into a special trust fund known as the School District Trust Fund. Section 144.701, RSMo Supp. 1984, requires the appropriation of the "Proposition C" moneys by the General Assembly. Section 144.701, RSMo Supp. 1984, imposes certain duties upon the State Treasurer relating to the investment, deposit, and distribution of the School District Trust Fund.

"Proposition C" moneys are deposited in the State Treasury, are invested and distributed by the State Treasurer, and are appropriated by the General Assembly. The deposit of "local" funds in the State Treasury may be in violation of Article IV, Section 15, Missouri Constitution, which prohibits the imposition of any duty on the State Treasurer which is not related to the receipt, investment, custody, and disbursement of state funds. We do not opine on that question. Cf. Sections 67.525, 67.570 and 67.594, RSMo Supp. 1984, relating to county sales taxes.[1] If we assume, for purposes of this opinion, that "Proposition C" moneys are local in nature, then Section 30.240, RSMo Supp. 1984, has no application because it applies only to state funds. Interest earned on local funds would belong to local entities.

On the other hand, even if we assume that "Proposition C" moneys are state funds, we conclude that Section 30.240, RSMo Supp. 1984, does not direct that interest earned on the School District Trust Fund is to be credited to the State's General Revenue Fund.

The common law rule is that interest on public funds designated for a specific purpose follows those funds in the absence of an unequivocal legislative expression otherwise. State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 537 (Mo.Banc 1979); State ex rel. School District of Springfield

---

[1]The "local funds" language of Sections 144.701 and 163.087.3, RSMo Supp. 1984, was apparently drafted in an attempt to have these funds omitted from the calculation of the State's revenue and spending limits in the Hancock Amendment, Article X, Sections 18(a) and 20, Missouri Constitution. The Supreme Court of Missouri has determined that these funds are not subject to the Hancock Amendment's revenue and spending limits upon other grounds. Dirck v. State, 665 S.W.2d 615 (Mo.Banc 1984); Goode v. Bond, 652 S.W.2d 98 (Mo.Banc 1983).

R-12 v. Wickliffe, 650 S.W.2d 623 (Mo.Banc 1983); and State Highway Commission v. Spainhower, 504 S.W.2d 121 (Mo. 1973). See also Opinion No. 76, Jaeger, 1971 (Interest on the Dr. Edmund A. Babler Memorial State Park Fund credited to such fund) and Opinion No. 84, Fine, 1965 (which, relying on Board of Public Buildings v. Crowe, 363 S.W.2d 598 (Mo.Banc 1963), concluded that interest earned on state park revenue bond sinking funds is credited to such funds).

Section 30.240, RSMo Supp. 1984, generally directs that "[u]nless otherwise provided by law, . . ." the interest earned from the deposit or investment of state moneys is to be credited to the State's General Revenue Fund. Section 144.700, RSMo Supp. 1984, provides that revenue derived from the "Proposition C" moneys shall be held in the School District Trust Fund. Section 144.701, RSMo Supp. 1984, states that all revenue derived from the "Proposition C" moneys shall be deposited in the School District Trust Fund. In State Highways and Transportation Commission of Missouri v. Director, Missouri Department of Revenue, 672 S.W.2d 953, 955 (Mo. Banc 1984) (quoting, Webster's Third New International Dictionary (1976)), the court indicated that the word "derivative" means "'secondary: grows out of, or results from an earlier or fundamental state or condition.'"

Interest grows out of the corpus of the fund, and thus interest earned on the School District Trust Fund is derived from such fund. Sections 144.700 and 144.701, RSMo Supp. 1984, are laws that "otherwise provide" for the disposition of interest earned on the School District Trust Fund for purposes of Section 30.240, RSMo Supp. 1984. Sections 144.700 and 144.701, RSMo Supp. 1984, require the interest earned on the School District Trust Fund be credited to such fund and distributed pursuant to Section 163.087, RSMo Supp. 1984.

Finally, we note that your question involves legal issues which are difficult to resolve and about which reasonable men may differ. It is our view, however, that, all considered, the conclusion we reach is consistent with the intent of the voters and the General Assembly.

Arthur L. Mallory, Ph.D.

CONCLUSION

It is the opinion of this office that Sections 144.700 and 144.701, RSMo Supp. 1984, require all revenue derived from tax money deposited in the School District Trust Fund, Section 144.701, RSMo Supp. 1984, including interest derived from such fund, to be credited to the School District Trust Fund and distributed in the manner provided by Section 163.087, RSMo 1984.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Attorney General of Missouri

William L. Webster
~~JOHN ASHCROFT~~
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321
DIRECT DIAL:

January 24, 1985

OPINION LETTER NO. 6-85

FILED
6

The Honorable John L. Goldman
Representative, District 98
8505 Elsa
Affton, Missouri 63123

Dear Representative Goldman:

This letter is in response to your questions as follows:

1. Is it necessary for a school board to issue contracts to tenured, permanent teachers by April 15 of each year?

2. Is it necessary for a school board to set the salary schedule on or before April 15?

3. Once a salary schedule has been adopted and contracts have been issued, how may a school board and teacher modify the contract if the change is mutually acceptable?

4. Once a salary schedule has been adopted and contracts have been issued, when may a school board and a teacher modify the contract if the change is mutually acceptable?

The facts stated in support of your request are as follows:

Historically, the Affton School District has adopted an amended salary schedule for its tenured teachers on or before April 15. The Board adopted the salary schedule for the 1984-85 school year on April 9, 1984. The

> Board issued the contracts for the 1984-85 school year during the week of April 8 - 12, 1984.
>
> In July of 1984, the School Board revised its budget, because of greater amounts in its year end balances.
>
> The superintendent recommended, to the Board, that the tenured teachers contracts be modified to give a 2% raise. The Board rejected this modification based upon the recommendation of the Board attorney that a raise at that time would be illegal.

Section 168.106, RSMo 1978, authorizes an indefinite contract between a school district and a permanent teacher, which may be terminated only under certain conditions. Section 168.108, RSMo 1978, establishes the form for the indefinite contract; such form, inter alia, sets forth the annual compensation. Section 168.110, RSMo 1978, provides that a board of education may modify an indefinite contract, as to the annual compensation, annually on or before the fifteenth day of April. Section 168.112, RSMo 1978, provides that an indefinite contract may be modified or terminated at any time by the mutual consent of the parties.

Although Section 168.112, RSMo 1978, would appear to authorize a mutually agreeable modification in an indefinite contract providing a mid-year salary increase, such statute must be read in harmony with the Constitution of Missouri.

Article III, Section 38(a), Missouri Constitution, states in part:

> The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting . . . .

Article III, Section 39(3), Missouri Constitution, states:

> The general assembly shall not have power:
>
> * * *
>
> (3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer,

> agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part;

Article VI, Section 23, Missouri Constitution, states:

> No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.

Article VI, Section 25, Missouri Constitution, states:

> No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided in Article VI, Section 23(a) and except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the widows and children of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estates; and except, also, that any county of the first class is authorized to provide for the creation and establishment of death benefits, pension and retirement plans for all its salaried employees, and the widows and minor children of such deceased employees.

In Opinion No. 211, Belt, 1970, copy enclosed, this office concluded that the granting of a three hundred dollars ($300.00) per teacher bonus during the school year to teachers already under contract to perform services during that year violated Article III, Sections 38(a) and 39(3), Missouri Constitution. Whatever is the efficacy of that conclusion, we believe that giving teachers a bonus for services already contracted for is a grant of public

funds prohibited by Article VI, Sections 23 and 25, Missouri Constitution. Accordingly, modifications of teachers' contracts of the type proposed are unconstitutional.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure:
Opinion No. 211, Belt, 1970

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

September 6, 1985

OPINION LETTER NO. 7-85

FILED
7

Paul R. Ahr, Ph.D., M.P.A.
Director, Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101

Dear Dr. Ahr:

This opinion in is response to your question asking:

> Is the Department of Mental Health required by law to seek competitive bids and process payments for its community placement program through the Division of Purchasing of the Office of Administration?

Section 34.030, RSMo 1978, states in part: "The commissioner of administration shall purchase all supplies for all departments of the state except as in this chapter otherwise provided. ..." (Emphasis added.)

Section 34.040, RSMo Supp. 1984, states in part: "Purchases shall be based on competitive bids, except that the commissioner may make purchases of less than one hundred dollars in value on the open market. ..." (Emphasis added.)

Section 34.010, RSMo 1978, states:

> 1. "Contractual services" shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service.
>
> 2. The term "department" as used in this chapter shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments.

3. The term "purchase" as used in this chapter shall include the rental or leasing of any equipment, articles or things.

4. The term "supplies" used in this chapter shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided. [Emphasis in original.]

Section 34.100, RSMo Supp. 1984, states:

1. The commissioner of administration shall have power to authorize any department to purchase direct any supplies which in his judgment can best be purchased direct by such department. He shall prescribe rules under which such direct purchases shall be made; provided, however, that all such direct purchases shall be based upon competitive bids as otherwise required by this chapter. The commissioner in promulgating such rules may establish a procedure for a waiver of competitive bids where the bids received are not acceptable or where a minimum number of bids was not received and may allow for rebidding. The rules also may provide for a waiver of the bid procedure and may allow departments to negotiate the purchase of services for patients, residents, or clients with funds appropriated for this purpose. Each waiver issued by the commissioner shall be valid for no longer than one year and may be renewable by the commissioner. All such direct purchases shall be reported immediately to the commissioner of administration, together with all bids received and prices paid. No claim for payment based upon any such direct purchase shall be certified by the commissioner unless accompanied by such documentation of compliance with the provisions of this chapter as he may require.

2. The commissioner shall have power to make or to authorize emergency purchases not to exceed the cost of one thousand dollars to be made direct by any department. [Emphasis added.]

Although the last quoted statute contemplates the promulgation of rules by the Commissioner of Administration, the Office of Administration currently operates on a case-by-case basis, granting departments documents denominated as "delegations of authority" to purchase supplies directly and "waivers of bid procedures" to authorize the department to purchase supplies on a noncompetitive bid basis.

The Department of Mental Health is part of the executive branch of Missouri government. Article IV, Section 12, Missouri Constitution. The Community Placement Program referred to in your question is organized pursuant to Sections 630.605 to 630.660, RSMo Supp. 1984. The Community Placement Program differs from the Purchase of Services Program organized pursuant to Sections 630.405 to 630.460, RSMo Supp. 1984. The Purchase of Services Program is expressly covered by the State Purchasing Law. Section 630.405.3, RSMo Supp. 1984. Generally, under the Community Placement Program, the client must give his or her informed consent prior to placement. Section 630.625, RSMo Supp. 1984. If the client does not consent to the placement, then alternative proposals are presented. Sections 630.630 and 630.635, RSMo Supp. 1984. We find no statute exempting the Community Placement Program from the State Purchasing Law, Chapter 34, RSMo 1978 and RSMo Supp. 1984. Cf. Section 200.071, RSMo Supp. 1984 (exempting the State Cancer Commission from the State Purchasing Law). Accordingly, we conclude that the Department of Mental Health is a "department", as that term is defined in Section 34.010.2, RSMo 1978, and that the Commissioner of Administration purchases all "supplies" for the Department of Mental Health's Community Placement Program under Section 34.030, RSMo 1978, except as otherwise provided by Section 34.100, RSMo Supp. 1984.

The term "supplies" is defined in Section 34.010.4, RSMo 1978, in part, to mean "contractual services". The term "contractual services" is defined in Section 34.010.1, RSMo 1978, and was interpreted in Opinion No. 163, Nielsen, 1975, as including other services not specifically mentioned. In Opinion Letter No. 22, Muckler, 1980, this office found that the term "contractual services" does not include the services of physicians, attorneys and expert witnesses. In Opinion No. 128, Bradford, 1981, this office concluded that professional and technical services other than those dealt with in the Muckler opinion letter are "contractual services" under the State Purchasing Law. Accordingly, it is the opinion of this office that the Commissioner of Administration purchases supplies for the Department of Mental Health's Community Placement Program, except for the services of physicians, lawyers and expert witnesses, and except for purchases where a delegation of authority has been issued by the Office of Administration to the Department of Mental Health pursuant to Section 34.100, RSMo Supp. 1984. Purchases for the Community Placement Program are to be based upon competitive bid, except where the competitive bid requirement has been waived

by the Office of Administration under Section 34.100, RSMo Supp. 1984, and except for purchases of legal, medical and expert witness services.

We are aware that the statutes governing the Community Placement Program may require successive alternative proposals to be presented to each client, and that the Community Placement Program is geared to individualized placement. However, if the purchase of community placement services by the Office of Administration upon competitive bid is inefficient, the remedy is for the Department of Mental Health to obtain delegations of authority to purchase such services directly and waivers of competitive bid procedures from the Office of Administration under Section 34.100, RSMo Supp. 1984.

Yours very truly,

WILLIAM L. WEBSTER
Attorney General

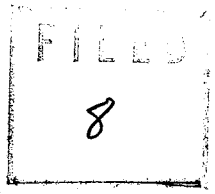
DEPARTMENT OF CORRECTIONS:
JUDICIAL PAROLES:
PAROLE:
PROBATION:
SUSPENDED SENTENCES:

The Board of Probation and Parole has the power to parole individuals committed to an institution under Sections 195.200.1(3) and 195.200.1(5), RSMo Supp. 1984, in that the prohibition against granting parole, probation, suspended sentences, or other forms of judicial clemency contained in Section 195.200.8, RSMo Supp. 1984, apply only to the Judiciary.

February 1, 1985

OPINION NO. 8-85

Lee Roy Black, Ph.D., Director
Department of Corrections and
Human Resources
2729 Plaza Drive
Jefferson City, Missouri 65101



Dear Dr. Black:

This opinion is in response to your request as follows:

> Missouri Revised Statute 195.200, section 8 states "no parole, probation, suspended sentence or any other form of judicial clemency may be exercised in behalf of any person punished under subdivision 3 or 5 of subsection I". Does this section prohibit the Board of Probation and Parole from paroling individuals committed under this section or does this section only apply to "forms of judicial clemency"?

Section 195.200.1(3) and (5), .6, and .8, RSMo Supp., 1984,[1] state:

> 1. Any person violating any provision of this chapter relating to Schedules I or II is punishable as follows:
>
> . . .
>
> (3) Except as provided in paragraph (b) of subdivision (1) of subsection 1 of this section, for the third or subsequent offense under this chapter, relating to Schedule I

[1]All statutory references are to RSMo Supp. 1984, unless otherwise indicated.

> and II other than selling, giving or delivering of any drug listed in Schedule I or II, or if the person has previously been convicted two or more times in aggregate of any felony violation of the laws of this state, or of the United States, or of any other state, territory or district relating to controlled substances, by imprisonment in a state correctional institution for a term of not less than ten years nor more than life imprisonment.
>
> . . .
>
> (5) For the offense of selling, giving or delivering any controlled substance listed in Schedule I or II to a person if the offender has previously been convicted of any felony violation of the laws of this state, or of the United States, or any other state, territory or district relating to controlled substances, by imprisonment in a state correctional institution for a term of not less than ten years nor more than life imprisonment.
>
> . . .
>
> 6. If any person is to be punished under the provisions of subdivision (2), (3), or (5) of subsection 1, the duty develops upon the court to affix the term of imprisonment; in all other cases punishment shall be affixed as otherwise provided by the law.
>
> . . .
>
> 8. No parole, probation, suspended sentences or any other form of judicial clemency may be exercised in behalf of any person punished under subdivision (3) or (5) of subsection 1. [Emphasis added.]

I.

There are two systems of parole in Missouri: judicial parole and administrative parole. In re Green, 657 S.W.2d 743 (Mo. App. 1983).

"The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to

that intent if possible, and to consider words used in the statute in their plain or ordinary meaning." City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 445 (Mo. banc 1980). The language of Section 195.200.8 clearly supports the position that the prohibition against granting parole, probation, and suspended sentences to those persons committed under Section 195.200.1(3) or (5) applies only to judicial clemency. The plain language of the statute states that the prohibition is against certain specific forms of clemency and "any other form of judicial clemency". (Emphasis added.)

II.

The position that the limitations imposed are upon judicial acts alone is consistent with the content of Section 195.200.8. The statute enumerates three forms of clemency--parole, probation, and suspended sentences--that are prohibited to persons committed under Section 195.200.1(3) and (5). All three forms of clemency enumerated may be granted by a court. However, probation and suspended sentences may not be granted by the Board. Consequently, the usage of the "any other form of judicial clemency" language quoted above implies that the Missouri General Assembly intended this statutory provision to limit only the powers of the Judiciary.

III.

Section 217.765.1 provides:

> The circuit courts of this state shall have power, herein provided, to place on probation or to parole persons convicted of any offense over which they have jurisdiction, except as otherwise provided in sections 195.200, 558.018, RSMo, and section 217.775. [Emphasis added.]

The limitation on forms of judicial clemency in Section 195.200.8 dates from 1961. S.B. 221, 1961 Mo. Laws 515. (A similar limitation was enacted by S.B. 115, 1957 Mo. Laws 679, 683-684, but such was repealed by S.B. 240, 1959 Mo. Laws.) Section 549.061, as enacted by S.B. 47, 1965 Mo. Laws 663, 664 (repealed), applicable to both judicial and administrative parole, stated:

> The circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis and boards of parole created to serve any court have power, as herein provided, to place on probation or to parole persons convicted of any offense

> over which they have jurisdiction; except as otherwise provided in section 195.200, RSMo. [Emphasis added.]

The "except" proviso quoted above originated in 1965.

In H.B. 1196, 1982 Mo. Laws 435, 473, the judicial probation and parole statute, the present Section 217.765.1, was split off from the administrative parole section, Section 217.690. The "except" proviso was carried forward only in the judicial probation and parole statute, Section 217.765.1. The fact that the "except" proviso was not carried forward in the administrative parole statute, Section 217.690, shows that the "exception" or limitation found in Section 195.200.8 applies only to forms of judicial clemency and not to "administrative" parole granted by the Board of Probation and Parole.

As always in our opinions, we seek to analyze the law, as written, and decide the issues presented to us as would a court faced with a similar legal question. Yet, the practical effect of our opinion is that convicted, dangerous narcotics dealers may be considered for parole by the Board of Probation and Parole, but these same individuals may not be considered for parole by a court. The wisdom of this distinction escapes us.

To eliminate this distinction without a difference, Section 195.200.8 should be amended to read:

> 8. No parole, probation, or suspended sentences may be exercised on behalf of any person punished under subdivision (3) or (5) of subsection 1.

Also, Section 217.690.1 should be amended to read:

> 1. When in its opinion there is reasonable probability that an inmate of a state correctional institution can be released without detriment to the community or to himself, the board may in its discretion release or parole such person, except as otherwise provided in Section 195.200, RSMo. All paroles shall issue upon order of the board, duly adopted.

If these or similar amendments had been made to the statutes of this state by the General Assembly, our opinion would have reached a different result. We call upon the members of the General Assembly of the State of Missouri to adopt corrective legislation at the earliest possible date.

CONCLUSION

It is the opinion of this office that the Board of Probation and Parole has the power to parole individuals committed to an institution under Sections 195.200.1(3) and 195.200.1(5), RSMo Supp. 1984, in that the prohibition against granting parole, probation, suspended sentences, or other forms of judicial clemency contained in Section 195.200.8, RSMo Supp. 1984, apply only to the Judiciary.

Yours very truly,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

WILLIAM L. WEBSTER
ATTORNEY GENERAL

Attorney General of Missouri

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321
DIRECT DIAL:

February 1, 1985

OPINION LETTER NO. 9-85

The Honorable Robert T. Johnson
Missouri State Senator
District 8
Capitol Building
Jefferson City, Missouri 65101

FILED
9

Dear Senator Johnson:

This letter is in response to your question asking as follows:

> Does House Bill #928, state preemption of firearms control, prohibit or invalidate city ordinances relating to the disposition of seized, stolen and unclaimed firearms by local police departments?

Your request stems from an inquiry made by the City of Independence, Missouri, a constitutional charter city operating under Article VI, Section 19(a), Missouri Constitution. The city's concern is whether House Bill No. 928, Second Regular Session, 82nd General Assembly, prevents the city from applying its ordinances relating to the disposition of firearms which are being held either as stolen property or as seized property by the city police department.

House Bill No. 928 is now found in Section 21.750, RSMo Supp. 1984, and provides as follows:

> 1. The general assembly hereby occupies and preempts the entire field of legislation touching in any way firearms, components, ammunition and supplies to the complete exclusion of any order, ordinance or regulation by any political subdivision of this state. Any existing or future orders, ordinances or regulations in this field are hereby and shall be null and void except as provided in subsection 3 of this section.
>
> 2. No county, city, town, village, municipality, or other political subdivision of this

> state shall adopt any order, ordinance or regulation concerning in any way the sale, purchase, purchase delay, transfer, ownership, use, keeping, possession, bearing, transportation, licensing, permit, registration, taxation other than sales and compensating use taxes or other controls on firearms, components, ammunition, and supplies except as provided in subsection 3 of this section.
>
> 3. Nothing contained in this section shall prohibit any ordinance of any political subdivision which conforms exactly with any of the provisions of sections 571.010 to 571.070, RSMo, with appropriate penalty provisions, or which regulates the open carrying of firearms readily capable of lethal use or the discharge of firearms within a jurisdiction. This section shall take effect on January 1, 1985.

The title of House Bill No. 928 is:

> AN ACT relating to state preemption in the area of firearms regulation with an effective date.

The Sections which are referred to in Section 21.750.3 are, with the exception of Section 571.015 to be found in RSMo Supp. 1984. Such sections relate to weapons offenses. More specifically, Section 571.010, weapons definitions, Section 571.015, armed criminal action, Section 571.017, imposition of sentences, Section 571.020, possession, manufacture, transportation, repair and sale of certain weapons, Section 571.030, unlawful use of weapons, Section 571.050, defaced firearms, Section 571.060, unlawful transfer of weapons, and, Section 571.070, possession of concealable firearms.)

It is obvious that Section 21.750.1 when read alone appears to create a broad preemption relating to firearms. However, the title of the act clearly describes the act as relating to state preemption in the area of firearms regulation. Further, subsections 2 and 3 of Section 21.750 indicate that the legislative intent was to limit the state preemption to the area of firearms regulation and not to matters such as the authority of the City of Independence to dispose of seized or stolen property.

The rules of construction applicable here are that the court will presume that the legislature did not intend to enact an absurd law, State ex rel. Safety Ambulance Service, Inc. v. Kinder, 557 S.W.2d 242 (Mo banc 1977) and that the letter of the statute may be enlarged or restrained according to the true intent of the framers of the law. Stack v. General Baking Co., 223 S.W. 89 (1920).

Thus, it is our view that such city ordinances which control the procedure for the disposition of seized, stolen or unclaimed firearms held by the city are not invalidated by the provisions of Section 21.750. This opinion, however, does not pass upon the validity of such ordinances in any other respect. For example, compare Section 542.301, RSMo Supp. 1984, pertaining to the disposition of certain unclaimed seized property.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Attorney General of Missouri

William L. Webster
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321
DIRECT DIAL:

January 21, 1985

OPINION LETTER NO. 11-85

FILED
11

The Honorable Carl M. Koupal, Jr.
Director, Department of Economic Development
Post Office Box 1157
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This letter is in response to a request from your predecessor in office for an opinion of this office asking as follows:

> Is it a conflict of interest for the Executive Director of the Missouri State Board of Cosmetology or his/her spouse to be a co-owner and/or instructor of a Cosmetology school which is registered with the Board or for which an application for a certificate of registration is pending pursuant to Section 329.040 RSMo?

Your statement of facts states:

> The duties of the Executive Director include supervision and management of the operations of a staff of eighteen employees who are responsible for examining and issuing licenses to cosmetology students, apprentices, cosmetologists, instructors, cosmetology schools and shops. Some of the specific functions include:
>
> a) issue permits to all cosmetology school students;
> b) handle all student and consumer complaints and present them to the Board;
> c) review license applications for cosmetology schools;
> d) inspect all schools of cosmetology;

e) license cosmetology instructors;
f) test graduates of beauty schools to determine if they have adequately completed courses necessary for licensure.

In addition, the Director develops and presents policies and regulations applicable to cosmetologists and cosmetology schools, students and the instructors to the Board for adoption and presents cases (regarding licensure, disciplinary action, complaints, etc.) to the Board and implements Board decisions in those cases.

We note that the documents you have submitted to us indicate that the Executive Director and her spouse own the cosmetology school and that the Executive Director is a designated staff instructor of the school.

In our Opinion No. 536 dated December 19, 1969, to Leonard, not enclosed, this office concluded that the Secretary of the Missouri Real Estate Commission is prohibited from engaging in the real estate practice because of a conflict between the duties of such secretary and the secretary's activities as a practicing realtor. In reaching that conclusion this office quoted the general statement of law which is now found in 63A Am. Jur. 2d § 321, Public Officers and Employees, as follows:

> A public officer owes an undivided duty to the public whom he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public.

The same source at § 322 states:

> A person's status as a public officer forbids him from placing himself in a position where his private interest conflicts with his public duty. His good faith is of no moment because it is the policy of the law to keep him so far from temptation as to insure the exercise of unselfish public interest. This policy is not limited to a single category of public officer but applies to all public officials. Anything which tends to weaken public confidence and to undermine the sense of security for individual rights is against public policy.

> The state has a substantial compelling interest in restricting unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.

See also State ex inf. Taylor v. Cumpton, 240 S.W.2d 877, 886 (Mo. banc 1951), State ex rel. St. Louis County v. Kelly, 377 S.W.2d 328, 332 (Mo. 1964).

In addition the common law principles we have discussed form the basis for Governor's Executive Order No. 81-2 dated February 10, 1981, which provides in pertinent part:

> (6) No appointed official or state employee shall engage in or accept private employment or render services for private interest when such employment or service is incompatible or in conflict with the proper discharge of their official duties or would tend to impair their independence, judgment, or action in the performance of their official duties . . .

Considering the nature of the duties of the Executive Director as set out in your statement and as contained in the job description for that position, it is our view that there would be an appearance of a conflict of interest for the Executive Director of the State Board of Cosmetology to be a co-owner and instructor of a cosmetology school registered with the Board or for which an application is pending. Public servants should avoid even the appearance of conflicts of interest.

Yours very truly,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Attorney General of Missouri

WILLIAM L. WEBSTER
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

DIRECT DIAL: (314) 751-3321

February 14, 1985

OPINION LETTER NO. 13-85

The Honorable Weldon W. Perry, Jr.
Prosecuting Attorney of Lafayette County
1021 Franklin
Lexington, Missouri 64067

FILED
13

Dear Mr. Perry:

This letter is in response to your request for an opinion of this office asking as follows:

> Do the statutory salary increases provided for juvenile court personnel in Section 211.381, RSMo., effective August 13, 1984 absorb and incorporate or increase and add to salary adjustments under Section 476.405, RSMo., which were previously provided to juvenile court personnel in a second class county within a two county judicial circuit.

You also state in your statement of facts:

> Juvenile court personnel are authorized a pay increase under Section 211.381, RSMo., effective August 13, 1984. These personnel have previously received incremental salary adjustments under Section 476.405, RSMo., in accord with the following schedule:
>
> A) July, 1983 — $20.00 per month
> B) July, 1984 — 7% of existing statutory salary and prior cost of living raise.

Further correspondence with you indicates that the crux of the problem to which you refer is contained in a paragraph of a letter from the Office of Administration, dated August 14, 1984, as follows:

> A new statutory salary is effective January 1, 1985, in the amount of $18,650.00 for Chief Deputy Juvenile Officers. Reimbursement for 1985 will be this statutory salary plus any subsequent increases in 1985 but no previous increases. The reimbursements are not based on statutory amounts plus past salary increases.

The 82nd General Assembly passed two sections amending Section 211.381, RSMo Supp. 1983.

Senate Bill 694, 82nd General Assembly, Second Regular Session, effective August 13, 1984, except as provided therein, provides as follows:

> 1. In each judicial circuit the following employees of the juvenile court shall annually receive as compensation the following amounts:
>
> (1) One juvenile officer, eighteen thousand six hundred ninety dollars;
>
> (2) One chief deputy juvenile officer and the chief officer assigned to courts of domestic relations, sixteen thousand six hundred fifty dollars; for calendar year 1985, eighteen thousand six hundred fifty dollars; beginning January 1, 1986, twenty thousand six hundred fifty dollars;
>
> (3) Deputy juvenile officer, class 1, fourteen thousand six hundred ten dollars; for calendar year 1985, sixteen thousand three hundred ten dollars; beginning January 1, 1986, eighteen thousand ten dollars;
>
> (4) Deputy juvenile officer, class 2, thirteen thousand eighty dollars; for calendar year 1985, fourteen thousand five hundred eighty dollars; beginning January 1, 1986, sixteen thousand eighty dollars;
>
> (5) Deputy juvenile officer, class 3, eleven thousand five hundred dollars; for calendar year 1985, twelve thousand nine hundred fifty dollars; beginning January 1, 1986, fourteen thousand three hundred fifty dollars;

(6) Deputy juvenile officer, class 4, ten thousand twenty dollars; for calendar year 1985, eleven thousand three hundred twenty dollars; beginning January 1, 1986, twelve thousand six hundred twenty dollars.

2. Such employees of the juvenile court shall receive in addition to any salary provided by this section any salary adjustment paid to employees in the judicial department.

3. Actual expenses, including mileage allowance not to exceed that amount allowed state officers for each mile traveled on official business but exclusive of office expense, incurred by the employees while in the performance of their official duties shall be reimbursed to them out of county or city funds upon the approval of the judge of the juvenile court.

House Committee Substitute for Senate Bill 581, 82nd General Assembly, Second Regular Session, also amended Section 211.381, effective January 1, 1985 except as provided therein, as well as other sections not relevant here, providing as follows in pertinent part:

1. In each judicial circuit the following employees of the juvenile court shall annually receive as compensation the following amounts:

(1) One juvenile officer, twenty-one thousand six hundred ninety dollars beginning on January 1, 1985, until December 31, 1985, and beginning on January 1, 1986, an annual sum not to exceed twenty-four thousand six hundred ninety dollars;

(2) One chief deputy juvenile officer and the chief officer assigned to courts of domestic relations, sixteen thousand six hundred fifty dollars;

(3) Deputy juvenile officer, class 1, fourteen thousand six hundred ten dollars;

(4) Deputy juvenile officer, class 2, thirteen thousand eighty dollars;

> (5) Deputy juvenile officer, class 3, eleven thousand five hundred fifty dollars;
>
> (6) Deputy juvenile officer, class 4, ten thousand twenty dollars.
>
> 2. Such employees of the juvenile court shall receive in addition to any salary provided by this section any salary adjustment provided pursuant to section 476.405, RSMo.
>
> 3. Actual expenses, including mileage allowance not to exceed that amount allowed state officers for each mile traveled on official business but exclusive of office expense, incurred by the employees while in the performance of their official duties shall be reimbursed to them out of county or city funds upon the approval of the judge of the juvenile court.
>
> 4. In second, third and fourth class counties the compensation for employees of the juvenile court provided by this section is the total amount of compensation the employee shall receive for duties pertaining to the juvenile court and includes the compensation provided by any other provision of law.

We note at the outset that H.C.S.S.B. 581 did not repeal S.B. 694. Therefore, both enactments must be read together.

Section 476.405.1, RSMo Supp. 1984, provides in pertinent part:

> Within the limits of any appropriation made for this purpose, the salary fixed by sections 211.381, 211.393, 477.130, 478.013, 478.018, 483,083, and 485.060, RSMo, may be adjusted in any one year by a salary adjustment.

In our view the quoted provisions clearly set out the compensation of certain juvenile court personnel effective January 1, 1985. There is no provision for any carry over, either express or implied, in the salary adjustments provided prior to that date. To the contrary, it appears that past adjustments were absorbed into the new statutory salaries.

It is axiomatic that provisions relative to officers' compensation must be strictly construed, Nodaway County v. Kidder, 129 S.W.2d 857 (Mo. 1939). Therefore, in our view, the only effective salary provided would be that which is expressly authorized by statute. For example, as of January 1, 1985, the salary of the chief deputy juvenile officer, pursuant to Section 211.381.1(2), S.B. 694, is $18,650.00 for the calendar year 1985 plus any salary adjustments for the year 1985.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

WILLIAM L. WEBSTER
ATTORNEY GENERAL

Attorney General of Missouri

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321
DIRECT DIAL:

February 14, 1985

OPINION LETTER NO. 14-85

FILED
14

The Honorable Marvin E. Proffer
Representative, District 158
State Capitol Building, Room 306
Jefferson City, Missouri 65101

Dear Representative Proffer:

This letter is in response to your question asking:

> Whether boards appointed under sections 205.968 and 205.970, RSMo. 1969 (L. 1969 S.B. 40) for post-school handicapped persons are now authorized under sections 205.968 and 205.970, RSMo. Supp. 1984 (A.L. 1984 H.B. 1385) to contract with not-for-profit corporations to provide services to their infant and preschool developmentally disabled or handicapped population?

Section 205.968.2 and .3, RSMo Supp. 1984, states:

> 2. The facilities or services may only be provided for those persons defined as handicapped persons in section 178.900, RSMo, and those persons defined as handicapped persons in this section whether or not employed at the facility or in the community, and for persons who are handicapped due to developmental disability. All persons otherwise eligible for facilities or services under this section shall be eligible regardless of their age; except that, individuals employed in sheltered workshops must be at least sixteen years of age. The board may, in its discretion, impose limitations with respect to individuals to be served and services to

be provided. Such limitations shall be reasonable in the light of available funds, needs of the persons and community to be served as assessed by the board, and the appropriateness and efficiency of combining services to persons with various types of handicaps or disabilities.

3. For the purposes of sections 205.968 to 205.972, the term

(1) "Developmental disability" shall mean:

(a) A disability which is attributable to mental retardation, cerebral palsy, autism, epilepsy, a learning disability related to a brain dysfunction or a similar condition found by comprehensive evaluation to be closely related to such conditions, or to require habilitation similar to that required for mentally retarded persons;

(b) Which originated before age eighteen; and

(c) Which can be expected to continue indefinitely;

(2) "Handicapped person" shall mean a person who is lower range educable or upper range trainable mentally retarded or a person who has a developmental disability. [Emphasis added in part.]

Section 205.970.3 and .6, RSMo Supp. 1984, states:

3. Notwithstanding any provision of law to the contrary, and irrespective of whether or not a county sheltered workshop or residence facility has been established, the board may contract with any not for profit corporation for such corporation to provide services relating in whole or in part to the services which the board itself may provide to handicapped persons as defined in this law and for such purpose may expend the tax funds or other funds.

* * *

> 6. The board may contract with any not for profit corporation including any corporation which is incorporated for the purpose of implementing the provisions of sections 178.900 to 178.970, RSMo, for any common services, or for the common use of any property of either group.

Under the foregoing statutes, a board of directors of a county sheltered workshop may contract with a not-for-profit corporation to provide in whole or in part services for (1) persons defined as "handicapped persons" in Section 178.900, RSMo 1978 (which requires, in part, that the person be sixteen years of age or older), (2) persons who are defined as "handicapped persons" in Section 205.968.3 (2), RSMo Supp. 1984, whether or not such are employed at the facility or in the community, and (3) persons who are handicapped due to developmental disability.[1] The last two categories of persons are eligible without regard to their age. Section 205.968.2, RSMo Supp. 1984.

Sections 205.968 and 205.970, RSMo 1969 (repealed), referred to in your question, were enacted by Senate Bill No. 40, 1969 Mo. Laws 330. Your question appears to be whether county sheltered workshops originally organized pursuant to Senate Bill No. 40 are affected by later statutory enactments purporting to change the powers of all county sheltered workshops.

In State ex rel. Meyer v. Cobb, 467 S.W.2d 854 (Mo. 1971), it was held that the prohibition against retrospective legislation contained in Article I, Section 13, Missouri Constitution, does not apply against governmental entities, so long as private rights are not adversely affected. That case dealt with a hospital district organized under Chapter 206, RSMo, and established on March 5, 1963. Effective October 13, 1967, Chapter 206, RSMo, was amended to require an automatic dissolution of any hospital district where, inter alia, no successful election to borrow money to fund the district was conducted within five years after the establishment of the district.

---

[1] In Opinion No. 167, Richardson, 1976 (withdrawn), this office interpreted the predecessor of Section 205.970.6, RSMo Supp. 1984, as not authorizing the disbursement of tax moneys pursuant to contract. In response, S.C.S.S.B. 359, 1977 Mo. Laws 390, enacted the predecessor of Section 205.970.3, RSMo Supp. 1984, which makes clear that tax moneys may be disbursed pursuant to contract.

The hospital district in question argued that application of the new automatic dissolution rule would be an unconstitutional, retrospective application of the laws. The court, finding that no private rights were affected by the automatic dissolution provision, concluded that application of the new automatic dissolution provision to the hospital district did not constitute an unconstitutional, retrospective application of the laws.

Finding no private rights adversely affected by the statutory expansion of the services available from county sheltered workshops,[2] we believe that Sections 205.968 and 205.970, RSMo Supp. 1984, apply to all county sheltered workshops including those originally organized pursuant to Senate Bill No. 40.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

[2]It may be possible for the private not-for-profit corporations to have their contractual rights adversely affected by the enactment of Sections 205.968 and 205.970, RSMo Supp. 1984; however, any such infringement of rights is not readily apparent.

CITIES OF THIRD CLASS:
CITIES, TOWNS, AND VILLAGES: (1) Third class cities under the mayor-council form of government pursuant to Chapter 77, RSMo 1978 and RSMo Supp. 1984, may provide fire protection services outside the city limits, so long as the safety, health, welfare, property, or commerce of the inhabitants of the city are benefited thereby; and (2) such cities may enter into mutual aid agreements with "voluntary" fire service organizations, so long as the safety, health, welfare, property, or commerce of the inhabitants of the city are benefited thereby.

February 22, 1985

OPINION NO. 17-85

The Honorable Bob Ward
Representative, District 151
Post Office Box 1548
Desloge, Missouri 63601

FILED
17

Dear Representative Ward:

This opinion is in response to your questions asking:

(1) May a third class city furnish fire protection outside the city limits, and if so, to whom?

(2) Can cities enter into mutual aid agreements with fire service organizations that are not statutory fire districts or incorporated cities, such as voluntary fire service organizations?

Your opinion request indicates that you are concerned with the City of Farmington; the City of Farmington is a third class city with the mayor-council form of government.

The controversy appears to involve the validity of Farmington City Code Section 29-125, which states:

> For all persons who are being furnished water by the city and living outside the city limits, the city shall furnish all the usual and available fire protection therefor without the usual described fees paid by non-

> residents of the city. However, the priorities for the use of the city fire equipment and crews shall remain the same with top priority for fire protection to be given to the residents of the city.[1]

This ordinance provides residents of the City of Farmington priority in fire services. Apparently, the City Council of Farmington has arrived at the "priority service" provision as a way of allocating the City's limited fire protection services. We assume that such a limitation is valid.

I. Extraterritorial Fire Protection Services

A. Constitutional Charter Cities

In Miller v. City of St. Joseph, 485 S.W.2d 688 (Mo.App. 1972), the issue was whether the City of St. Joseph had the authority to enter into oral understandings to provide fire protection services to the Stockyards Association and residents of four residential areas, all of which were located outside the city limits. The City of St. Joseph is a constitutional charter city operating under Article VI, Section 19(a), Missouri Constitution (as adopted October 5, 1971), which states:

> Any city which adopts or has adopted a charter for its own government, shall have all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution of this state and are not limited or denied either by the charter so adopted or by statute. Such a city shall, in addition to its home rule powers, have all powers conferred by law.

Such powers are sometimes referred to as "residual powers"; meaning, constitutional charter cities have all residual powers not prohibited

---

[1] We do not opine on the propriety of the City of Farmington exercising extraterritorial water service powers. See, e.g., Missouri Cities Water Company v. City of St. Peters, 534 S.W.2d 38 (Mo. 1976) (construing Section 250.190, RSMo 1969, and concluding that extraterritorial water service is authorized under such statute).

to them. Section 5.7 of the Charter of the City of St. Joseph required the city to provide fire protection services within the City of St. Joseph. Section 2.13(20) of the Charter of the City of St. Joseph provided that the City had the power to "[d]o all things whatsoever necessary or expedient for promoting and maintaining the comfort, education, morals, safety, peace, government, health, welfare, trade, commerce, or industry of the City and its inhabitants." 485 S.W.2d at 689.

Testimony at the trial showed that the City had an oral understanding to provide fire protection services to the members of the Stockyards Association. The Stockyards Association made an advance annual contribution of seventeen thousand five hundred dollars ($17,500.00), and members of the Stockyards Association agreed to pay fifty dollars ($50.00) per fire call into the Firemen's Pension Fund. Testimony also showed that the City agreed to provide fire protection services to four residential subdivisions outside the City containing approximately six hundred and fifty (650) houses; the subdivision construction contractor or the home associations were to pay the City fifty dollars ($50.00) per hour for each fire call.

The court noted that the combustible nature of the stockyards' facilities constituted a threat of the spread of fire to buildings within the city limits, but immediately adjoining the stockyards; that if the stockyards burned, many inhabitants of the City would be unemployed; and that many of the people who reside in the four residential areas are employed in the City, and the economic loss by fire to such people would affect the City. Accordingly, the court concluded that the City had the authority under Section 2.13 (20) of the City Charter to protect the safety, health, welfare, and commerce of the City by providing extraterritorial municipal fire protection services.

B. Statutory Class Cities

In contradistinction to the residual powers approach applicable to constitutional charter cities, third class cities with the mayor-council form of government are governed by the "Dillon" rule, named after Judge Dillon, who wrote a treatise on municipal corporations.

The Dillon rule is municipal corporations possess only those powers expressly granted to them, those powers implied in or incidental to those expressly granted them, and those powers essential to the municipality. Any reasonable doubt as to whether a power has been delegated to a municipality is resolved in favor of non-delegation. Anderson v. City of Olivette, 518 S.W.2d 34, 39 (Mo.

1975); State ex rel. City of Blue Springs v. McWilliams, 335 Mo. 816, 74 S.W.2d 363, 364 (Banc 1934) (quoting, 1 Dillon on Municipal Corporations, § 89 (3rd Ed.)). Extraterritorial powers must be expressly granted in clear and unmistakable language. See Taylor v. Dimmitt, 336 Mo. 330, 78 S.W.2d 841 (1934); Missouri Public Service Co. v. City of Trenton, 509 S.W.2d 770 (Mo.App. 1974). The general rule is that extraterritorial fire protection services are ultra vires. 16 E. McQuillin, The Law of Municipal Corporations, Section 45.05a (3rd Ed. S. Flanagan 1984).

Section 77.260, RSMo 1978, states:

> The mayor and council of each city governed by this chapter shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this state, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same. [Emphasis added.]

The above emphasized portion of this statute contains a "general welfare" clause (the "expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants" language) and a "residual powers" provision (the "all ordinances not repugnant to the constitution and laws of this state" language).

The courts have held that "general welfare" provisions may not be used as authority for the exercise of police powers not covered by a specific grant of power. Anderson v. City of Olivette, 518 S.W.2d 34, 37-38 (Mo. 1975); Tietjens v. City of St. Louis, 359 Mo. 439, 222 S.W.2d 70, 73 (Banc 1949). However, we find no interpretation of the "residual powers" provision in Section 77.260, RSMo 1978.

The "residual powers" provisions of Article VI, Section 19(a), Missouri Constitution, and Section 77.260, RSMo 1978, contain very similar language. We believe that the reasoning of the Miller case applies to third class cities with the mayor-council form of government, under the "residual powers" language found in Section 77.260, RSMo 1978, and that such cities may provide extraterritorial fire protection services, so long as the safety, health, welfare, property, or commerce of the inhabitants are benefited thereby. The

provision of such services, as provided by Farmington City Code Section 29-125, is not prohibited or repugnant to the Constitution and laws of this state.

We do note that Article VI, Sections 23 and 25, Missouri Constitution, prohibit the granting of free fire protection services to private entities. Accordingly, the provision of free extraterritorial fire protection services by a city is generally repugnant to the Constitution of Missouri. However, if the fire protection provided is primarily for a public purpose, then this consitutional prohibition is not applicable. See, e.g., State ex rel. Jardon v. Industrial Development Authority of Jasper County, 570 S.W.2d 666 (Mo.Banc 1978). If the provision of the fire protection services is primarily for the benefit of the landowner or resident of the property affected by the fire, then such services may not be granted free-of-charge. Such services would have to be provided by an oral contract, see Miller, 485 S.W.2d at 692 (oral city contracts are not enforceable against city but are not void per se), or a written contract, see Section 432.070, RSMo 1978. Such contractual charges are voluntary, and such charges do not need to be approved by the voters under the Hancock Amendment, Article X, Section 22(a), Missouri Constitution. See Pace v. City of Hannibal, No. 65725 (Mo.Banc 1984); Opinion No. 122, Leffler, 1982. Accordingly, the "no fees" provision of Farmington City Code Section 29-125 is constitutional only if the fire protection provided is for a public purpose, such as, to save the City of Farmington and its inhabitants from the spread of fire.

II. Mutual Aid Agreements With Voluntary Fire Service Organizations For Extraterritorial Fire Protection Services

Section 77.190, RSMo 1978, inter alia, authorizes third class cities with the council-mayor form of government to organize fire companies and pay the same for services provided; however, this statute does not authorize the operation of such fire companies outside the corporate boundaries of the city.

Sections 71.370 to 71.390, RSMo 1978, appear to authorize mutual aid agreements for extraterritorial fire protection services between cities. This statute does not authorize mutual aid agreements for extraterritorial fire protection services with private voluntary fire service organizations.

Article VI, Section 16, Missouri Constitution, and Section 70.220, RSMo 1978, authorize municipalities to contract with private entities for the planning, development, construction, acquisition, or operation of any public improvement or facility, or for a common service.

Section 432.070, RSMo 1978, states:

> No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.

In light of our conclusion above that Section 77.260, RSMo 1978, and the Miller case authorize third class cities with the mayor-council form of government to provide extraterritorial fire protection service, so long as the inhabitants of the city are benefited thereby, we believe that such extraterritorial services are within the scope of the city's powers and are a common service also provided by voluntary fire service organizations. Therefore, mutual aid agreements for extraterritorial fire protection services between third class cities with the mayor-council form of government and voluntary fire service organizations are authorized by Miller v. City of St. Joseph, 485 S.W.2d 688 (Mo.App. 1972); and Sections 70.220, 77.260 and 432.070, RSMo 1978.

We view the application of this opinion to be very limited. Cities are only allowed to provide extraterritorial fire protection services in order to "protect themselves". Accordingly, we do not view this opinion as authorizing the provision of extraterritorial fire protection services by cities, with or without mutual aid agreements, at distances far from the boundaries of the city.

CONCLUSION

It is the opinion of this office that:

(1) Third class cities under the mayor-council form of government pursuant to Chapter 77, RSMo 1978 and RSMo Supp. 1984, may provide fire protection services outside the city limits, so long as the safety, health, welfare, property, or commerce of the inhabitants of the city are benefited thereby; and

(2) such cities may enter into mutual aid agreements with "voluntary" fire service organizations, so long as the safety, health, welfare, property, or commerce of the inhabitants of the city are benefited thereby.

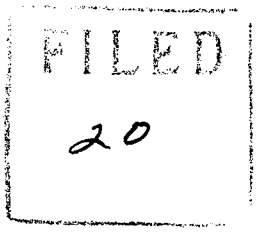
Very truly yours,

WILLIAM L. WEBSTER
Attorney General

DEPARTMENT OF CORRECTIONS: Subsection 3 of Section 217.425, RSMo Supp. 1984, does not grant circuit judges, sheriffs and prosecuting or circuit attorneys a right to veto inmate furloughs granted by the Director of the Division of Adult Institutions of the Missouri Department of Corrections and Human Resources or his designee.

March 11, 1985

OPINION NO. 20-85



Lee Roy Black, Ph.D., Director
Department of Corrections and
Human Resources
2729 Plaza Drive
Jefferson City, Missouri 65101

Dear Dr. Black:

This opinion is in response to your question asking:

> Does the furlough statute of Missouri authorize the prosecuting attorneys and circuit judges of counties and the City of St. Louis the right to veto the granting of furloughs by the Department of Corrections and Human Resources, Division of Adult Institution?

Section 217.425, RSMo Supp. 1984, states:

> 1. The division director may extend the limits of the place of confinement of an inmate who, he has reasonable cause to believe, will honor his trust, by authorizing him, under prescribed conditions, to visit specifically designated places within the state for a period not to exceed thirty days per year and to return to the same or another designated institution. The authority herein conferred may be exercised to permit the inmate to visit a relative who is ill, to attend the funeral of a relative, to obtain medical services not otherwise available,

> to contact prospective employers and to participate in approved rehabilitation programs. If the inmate is enrolled in a work release program or in need of emergency medical services, the thirty day per annum limitation shall not apply.
>
> 2. The division director may, under the terms of an interstate agreement, authorize an inmate to go beyond the limits of this state for the period of time and for any of the purposes set out in subsection 1 of this section. Prior to the authorization for an inmate to go beyond the limits of the state, the division shall obtain a written waiver of extradition from the inmate waiving his right to be extradited for any violation of his agreement and shall make arrangements for the return of the inmate with the proper authorities in the states in which he will be traveling.
>
> 3. A copy of any order of the division director shall be sent to the circuit judge, sheriff and prosecuting attorney of the county or circuit attorney of any city not within a county from which the inmate was sentenced and the county of the proposed visit at least ten days in advance of such order except in the case of an order permitting the visit to attend the funeral of a relative. [Emphasis added.]

The term "division director" is defined in Section 217.150(5), RSMo Supp. 1984, as the Director of the Division of Adult Institutions of the Missouri Department of Corrections and Human Resources, or his designee.

The legal issue presented is whether subsection 3 of Section 217.425, RSMo Supp. 1984, grants circuit judges, sheriffs and prosecuting or circuit attorneys the right to veto inmate furloughs granted by the Division Director, or his designee, or whether such merely provides such officials with notification of inmate furloughs.

Section 217.425, RSMo Supp. 1984, originated as House Bill No. 1039, 1972 Mo. Laws 853-854. The language at issue in subsection 3 of Section 217.425, RSMo Supp. 1984, was added by Senate Amendment No. 2 to House Bill No. 1039, Seventy-Sixth General Assembly, Second Regular Session, after the bill, as originally introduced, had been passed by the House. See II Senate Journal,

Lee Roy Black, Ph.D., Director

Seventy-Sixth General Assembly, Second Regular Session 527 (1972) (amendment offered by Senator Cason).

The "catch words" appearing before Section 3 of House Bill No. 1039, 1972 Mo. Laws at 854, state: "Section 3. Sentencing court, notification." Although the "catch words" appearing in connection with public statutes are not part of the bill to be interpreted, State ex rel. Rybolt v. Easley, 600 S.W.2d 601, 606 (Mo.App., W.D. 1980), we believe that in this instance the drafter of this note was correct in his interpretation of the statute.

On its face, subsection 3 of Section 217.425, RSMo Supp. 1984, does not authorize or empower a circuit court, sheriff and prosecuting or circuit attorney with the right to veto the Division Director's decision to grant inmate furloughs. The plain language of the statute mandates notification -- not authorization to veto.

Circuit courts have original jurisdiction in all criminal cases. Article V, Section 14(a), Missouri Constitution; Section 478.070, RSMo 1978; Section 541.020, RSMo 1978. Such jurisdiction extends until a final judgment is entered. See State v. Lynch, 679 S.W.2d 858 (Mo. banc 1984); State v. Jaeger, 394 S.W.2d 347, 352 (Mo. 1965). We believe it is difficult to find circumstances where a circuit court has jurisdiction over a defendant committed to the custody of the Division of Adult Institutions of the Department of Corrections and Human Resources. But see Section 217.775.2, RSMo Supp. 1984 (which allows circuit courts to grant defendants probation at any time up to one hundred and twenty days after he has been delivered to the custody of the Division of Adult Institutions). Accordingly, circuit courts do not have jurisdiction over a defendant in the custody of the Division of Adult Institutions of the Department of Corrections and Human Resources, and such courts may not veto decisions of such Division.

CONCLUSION

It is the opinion of this office that subsection 3 of Section 217.425, RSMo Supp. 1984, does not grant circuit judges, sheriffs and prosecuting or circuit attorneys a right to veto inmate furloughs granted by the Director of the Division of Adult Institutions of the Missouri Department of Corrections and Human Resources or his designee.

Yours very truly,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Attorney General of Missouri

WILLIAM L. WEBSTER
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

DIRECT DIAL: (314) 751-3321

February 22, 1985

OPINION LETTER NO. 21-85

The Honorable Gary E. Stevenson
Prosecuting Attorney
St. Francois County Courthouse
Farmington, Missouri 63640

FILED
21

Dear Mr. Stevenson:

This opinion is in response to your question asking:

> May a second class county pay for the purchase of materials that is less than $1,000.00, when said materials are ordered by a county office-holder after the County Court gave him an oral okay, but no county court order was signed until after or at the same time that the supplies were delivered.

As we understand the facts, the Sheriff of St. Francois County ran out of juror postcards and received oral permission from the St. Francois County Court to order some. The Sheriff's Office ordered postcards from a local printer and the bill came to ninety-seven dollars ($97.00). Subsequently, a county court order was executed approving the purchase of the cards at or before the time these cards were delivered and accepted. St. Francois County is a second class county without a purchasing agent.

Section 50.760, RSMo 1978, states:

> It shall be the duty of the judges of the county court in all counties of the second class, and in all counties of the first class not having a charter form of government if there is no purchasing agent appointed pursuant to section 50.753, on or before the first day of February of each year, to determine the kind and quantity of supplies, including any advertising or printing which the county may

> be required to do, required by law to be paid for out of the county funds, which will be necessary for the use of the several officers of such county during the current year, and to advertise for sealed bids and contract with the lowest and best bidder for such supplies. Before letting any such contract or contracts the court shall cause notice that it will receive sealed bids for such supplies to be given by advertisement in some daily newspaper of general circulation published in the county, such notice to be published on Thursday of each week for three consecutive weeks, the last insertion of which shall not be less than ten days before the date in said advertisement fixed for the letting of such contract or contracts, which shall be let on the first Monday in March, or on such other day and date as the court may fix between the first Monday of March and the first Saturday after the second Monday in March next following the publication of such notice; except that if by the nature or quantity of any article or thing needed for any county officer in any county of this state to which sections 50.760 to 50.790 apply, the same may not be included in such contract at a saving to such county, then such article or thing may be purchased for such officer upon an order of the county court first being made and entered as provided in sections 50.760 to 50.790; and except further, that if any supplies not included in such contract are required by any such officer or if the supplies included in such contract are exhausted then such article or thing may be purchased for such officer upon order of the county court first being made and entered of record as provided in sections 50.760 to 50.790. [Emphasis added.]

Section 50.660, RSMo Supp. 1984, states:

> All contracts shall be executed in the name of the county by the head of the department or officer concerned, except contracts for the purchase of supplies, materials, equipment or services other than personal made by the officer in charge of purchasing in any county having the officer. No contract or order imposing any financial obligation on the

> county is binding on the county unless it is in writing and unless there is a balance otherwise unencumbered to the credit of the appropriation to which it is to be charged and a cash balance otherwise unencumbered in the treasury to the credit of the fund from which payment is to be made, each sufficient to meet the obligation incurred and unless the contract or order bears the certification of the accounting officer so stating; except that in case of any contract for public works or buildings to be paid for from bond funds or from taxes levied for the purpose it is sufficient for the accounting officer to certify that the bonds or taxes have been authorized by vote of the people and that there is a sufficient unencumbered amount of the bonds yet to be sold or of the taxes levied and yet to be collected to meet the obligation in case there is not a sufficient unencumbered cash balance in the treasury. All contracts and purchases shall be let to the lowest and best bidder after due opportunity for competition, including advertising the proposed letting in a newspaper in the county with a circulation of at least five hundred copies per issue, if there is one, except that the advertising is not required in case of contracts or purchases involving an expenditure of less than one thousand five hundred dollars. It is not necessary to obtain bids on any purchase in the amount of one thousand dollars or less made from any one person, firm or corporation during any period of ninety days. All bids for any contract or purchase may be rejected and new bids advertised for. Contracts which provide that the person contracting with the county shall, during the term of the contract, furnish to the county at the price therein specified the supplies, materials, equipment or services other than personal therein described, in the quantities required, and from time to time as ordered by the officer in charge of purchasing during the term of the contract, need not bear the certification of the accounting officer, as herein provided; but all orders for supplies, materials, equipment or services other than personal shall bear the certification.

> In case of such contract, no financial obligation accrues against the county until the supplies, materials, equipment or services other than personal are so ordered and the certificate furnished.

In Opinion No. 9, Blackwell, 1961, copy enclosed, this office concluded that Sections 50.660 and 50.760, RSMo 1959, must be read together and that second class counties must comply with the last proviso of Section 50.760, RSMo 1959, if applicable. Accordingly, we conclude that compliance with the last proviso of Section 50.760, RSMo 1978, is required.

The next issue presented by the facts is whether the county court or commission order referred to in the last proviso of Section 50.760, RSMo 1978, may be entered after the Sheriff of St. Francois County has sent a written order to the local printer for the juror cards but before such juror cards have been delivered.

Section 432.070, RSMo 1978, states:

> No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing. [Emphasis added.]

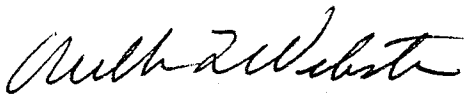
This statute requires county contracts to be subscribed by the parties thereto or their agents authorized by law and duly appointed and authorized in writing. Generally, Section 50.660, RSMo Supp. 1984, which we must read harmoniously with Section 50.760, RSMo 1978, allows the Sheriff, as a county officer, to execute purchase contracts. However, the last proviso of Section 50.760, RSMo 1978, appears to qualify the Sheriff's authority to execute contracts under Section 50.660, RSMo Supp. 1984, by requiring that he first be authorized by a written county court order, see Sections 432.070 and 50.760, RSMo 1978.

The first writing authorizing the Sheriff to purchase the juror cards occurred when the County Court or Commission issued

its order. At that point all of the requirements of Sections 432.070 and 50.760, RSMo 1978, and Section 50.660, RSMo Supp. 1984, were satisfied and the "purchase" occurred.

Section 432.070, RSMo 1978, also requires the consideration for a county contract to be wholly performed or executed subsequent to the making of the contract. Because the juror cards (the consideration) were delivered subsequent to the occurrence of the last event necessary for a valid contract (the County Court or Commission order), the purchase is a lawful one for purposes of county auditor's certificate under Section 50.160, RSMo 1978.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

Enclosure:
Opinion No. 9, Blackwell, 1961

WILLIAM L. WEBSTER
ATTORNEY GENERAL

Attorney General of Missouri

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321
DIRECT DIAL:

February 1, 1985

OPINION LETTER NO. 22-85

FILED
22

Eugene J. Feldhausen
Chairman, Missouri Highways and
Transportation Commission
Post Office Box 270
Jefferson City, Missouri 65102

Dear Mr. Feldhausen:

This letter is in response to your request for an opinion of this office asking:

> Is the Missouri Highway and Transportation Commission authorized to enter into an agreement with St. Louis County to permit the county to close a portion of State Highway Route 40 in St. Louis County near the Missouri River and to construct a temporary levee across the highway at such time as the Missouri River is forecast to reach the 100-year flood stage within twenty-four hours.

By agreement executed on September 7, 1984, the Missouri Highways and Transportation Commission and St. Louis County, Missouri, contracted for the closing of U.S. Highway 40-61 under flood conditions. In essence, after notice to the Commission of predicted flooding, St. Louis County will construct a temporary levee across Highway 40 in accordance with construction plans approved by the Commission. The county will be responsible for detour signing and, after flood waters recede, restoration of the right-of-way to pre-flood conditions. All expenses are the responsibility of the county.

The Missouri Highways and Transportation Commission is established by Article IV, Section 29, Missouri Constitution. Pursuant to that provision, the Commission has authority over all state transportation facilities as provided by law, including bridges and highways, and has authority to limit access to, from and across state highways where the public interest and safety may require.

Eugene J. Feldhausen

Article IV, Section 31, Missouri Constitution, states in part:

> The commission may enter into contracts with cities, counties or other political subdivisions for and concerning the maintenance of, and regulation of traffic on any state highway within such cities, counties or subdivision.

Under the flooding conditions described in the agreement, Highway 40 would be impassable whether St. Louis County constructed its levee or not. Thus, St. Louis County is not limiting access to, from or across state highways. Clearly, the agreement benefits both the state and the county by protecting the portion of the highway protected by the levee, by providing for necessary detours, and by protecting the substantial amount of public and private property within the levee.

It is, therefore, the opinion of this office that the agreement is squarely within the constitutional authorization of contracts "for and concerning the maintenance of, and regulation of traffic" on Highway 40, a state highway, and is, therefore, a valid agreement between the Missouri Highways and Transportation Commission and St. Louis County, Missouri.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

WILLIAM L. WEBSTER
ATTORNEY GENERAL

Attorney General of Missouri

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102
(314) 751-3321
DIRECT DIAL:

February 14, 1985

OPINION LETTER NO. 23-85

FILED
23

The Honorable Edwin Dirck
Senator, District 24
State Capitol Building, Room 221
Jefferson City, Missouri 65101

Dear Senator Dirck:

This letter is in response to your request for an opinion of this office asking whether in view of the legislative appropriation history of S.C.S.H.B. 1013, Eighty-Second General Assembly, the Department of Social Services had authority to utilize funds from C.C.S.H.B. 1011 for the purpose of relocation and movement of personnel from the Kansas City State Office Building or for the purpose of renovation of the office building.

It is our understanding that the appropriations to which you refer were in C.C.S.H.B. 1011, summarized in pertinent part as follows:

> Section 11.100. To the Department of Social Services, For the Division of Family Services, for the purpose of funding Administrative Services, Expense and Equipment.
>
> Section 11.105. To the Department of Social Services, For the Division of Family Services, For the purpose of funding Income Maintenance Administration, Expense and Equipment.
>
> Section 11.140. To the Department of Social Services, For the Division of Family Services, For the purpose of funding Children's Services Administration, Expense and Equipment.
>
> Section 11.171. To the Department of Social Services, For the Division of Family Services, For the purpose of funding Field Service Operations, Expense and Equipment.

> Section 11.210. To the Department of Social Services, For the Division of Family Services, For the purpose of funding Services for the Blind Administration, expense and equipment.

We believe that the threshold question is whether the Executive Branch of state government has the power to move personnel from the Kansas City State Office Building, to rent quarters from private interests and to renovate either the Kansas City State Office Building premises or the rented premises to make them suitable for present and future operations. In this respect we note that the Governor's Executive Order 84-10 dated July 24, 1984, found an asbestos hazard to exist in the Kansas City State Office Building and accordingly ordered the Office of Administration to implement a temporary relocation plan for state employees who work in that building, ordered that the directors and employees of the state agencies having personnel located in said building cooperate with the Office of Administration in the implementation of the temporary relocation plan and that the directors of such agencies provide adequate funding for that portion of the temporary relocation plan which affects their respective agency from existing F.Y. 1985 appropriations.

We are of the view that the Governor did in fact have the substantive authority to cause the agencies involved to move from said state office building and to rent space to house such agencies operations and to renovate such space to make it suitable for such agencies operations. The facts that we have at this time are not clear as to the expenditures that may have been made with respect to the renovation of the Kansas City State Office Building.

Your principal question asks whether the appropriations, which we have quoted above, made in C.C.S.H.B. 1011, could be expended for such moving, rent and renovation. In our view the purpose of said appropriations, "expense and equipment", was sufficient to cover such expenditures. You have inquired as to whether the legislative determination in the history of the appropriations measures would be sufficient to limit the purpose of the appropriations as stated in C.C.S.H.B. 1011. If the appropriations language was doubtful or ambiguous, it would be proper for a court to resort to the journals of the legislative assembly to ascertain the intent of the legislature. See Ex Parte Helton 93 S.W. 913 (St. Louis App. 1906). Further, under Section 490.160 RSMo 1978 the printed journals of the Senate and the House are prima facie evidence to the same extent that duly authenticated copies of the originals would be. Again, however, legislative intent appears to be only relevant when there is a statutory provision which is susceptible of several different constructions. Ex parte Helton at l.c. 915.

It is clear that the Executive Branch of state government does not generally have the authority to change the purpose of an appropriation. State ex. inf. Danforth v. Merrell, 530 S.W. 2d 209 (Mo. banc 1975). However, where the purpose of the appropriation is sufficiently broad to cover the expenditures made under the appropriation the rule of Merrell does not apply since there is no change of purpose.

Implicit within the questions you ask is the question of legislative control of expenditures by the appropriation process.

Article IV, Section 23, provides in pertinent part:

> Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose.

Section 21.260 RSMo 1978 provides:

> Appropriations for the operation and maintenance of departments shall be separately itemized; and separate appropriations shall be made for each item of extraordinary operation and maintenance expenditure and for each major capital expenditure. Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount of purpose.

Therefore it is clear that the legislature has a constitutional mandate to state the purpose for which appropriations are made. See our Opinion No. 331-1974, copy enclosed. However, this office concluded in Opinion No. 212-1974, copy enclosed, that, even assuming the legislature in a particular appropriation act did intend to set certain personnel positions and salaries, such would constitute general legislation in an appropriation bill and would be prohibited by Article III, Section 23, Missouri Constitution. See also Opinion No. 189-1974, copy enclosed.

We are also enclosing a copy of our Opinion No. 401-1971 which summarizes various instances in which this office expressed the view that certain limitations in appropriation acts constituted prohibited substantive legislation.

In the precise situation you present it seems likely that even an express and clear negative expression of legislative direction in an appropriation measure which is otherwise sufficient to permit such expenditures may be construed as invalid substantive legislation. From the prior opinions of this office which we have enclosed it can further be concluded that a

descent into minute detail could be construed as substantive legislation and prohibited as such or, depending upon the circumstances, may constitute a violation of the separation of powers clause in Article II, Section 1, Missouri Constitution.

Clearly, however, the Constitution mandates that the legislature distinctly specify the amount and purpose of the appropriation without reference to any other law. In this respect we again refer you to our Opinion No. 331-1974, copy enclosed, which found a limitation on expenditures based on the language used in the appropriation act.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosures:
Opinion No. 401-1971
Opinion No. 189-1974
Opinion No. 212-1974
Opinion No. 331-1974

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 28, 1985

OPINION LETTER NO. 24-85

John A. Pelzer
Commissioner
Office of Administration
Post Office Box 809
Jefferson City, Missouri 65102

FILED
24

Dear Mr. Pelzer:

This letter is in response to your question asking:

> For the purpose of administering the Social Security Agreement under Section 105.300 to 105.440:
>
> 1. Is compensation received pursuant to Sections 50.332 and 52.420 RSMo Supp. 1984 by county officials, i.e. county collector, "wages" for social security reporting purposes as defined in Section 105.300(12)?
>
> 2. If this is wages, then who is responsible for the reporting? Is the county responsible to report all of it or just that portion that goes through the county treasury? Is the municipality responsible for reporting these wages, either in whole or in part? Or, is the official responsible to report these wages as self-employment income?

Section 50.332, RSMo Supp. 1984, states:

> Each county officer in all counties except first class counties having a charter form of government may, subject to the approval of the governing body of the county, contract with the governing body of any municipality located within

> such county, either in whole or in part, to perform the same type of duties for such municipality as such county officer is performing for the county. Any compensation paid by a municipality for services rendered pursuant to this section shall be paid directly to the county, or county officer, or both, as provided in the provisions of the contract, and any compensation allowed any county officer under any such contract may be retained by such officer in addition to all other compensation provided by law.[1]

Section 52.420.3, RSMo Supp. 1984, states:

> 3. In all counties of the second class in which the county collector has entered into a contract with a constitutional charter city providing for the collection of municipal taxes by the collector, the collector shall be paid as compensation for the additional duties an annual salary of three thousand dollars, during the period in which the contract is effective, payable out of the county treasury.

Social Security coverage is extended to employment with a state or its political subdivisions only pursuant to agreement. 42 U.S.C.S. Section 418 (L.Ed. 1973 and Supp. 1984). In part, Section 105.310, RSMo 1978, authorizes the State of Missouri to enter into agreements for the purpose of extending the benefits of the federal old-age and survivors' insurance system to employees of any of its political subdivisions with respect to services which constitute "employment", as defined in Section 105.300, RSMo. Section 105.350, RSMo 1978, allows political subdivisions to submit individual or joint plans for extension of the benefits of Title 2 of the Social Security Act to its employees. One of the conditions of such a plan is that it cover all services which constitute "employment", as defined in Section 105.300, RSMo, and are performed in the employ of the political subdivision or instrumentality or in the employ of a member of any joint coverage unit.

---

[1]Section 50.332, RSMo Supp. 1984, originated as Section 2 of Conference Committee Substitute for Senate Bill No. 478, 1982 Mo. Laws 212. C.C.S.H.C.S.S.B. 478 was held unconstitutional in violation of Article VI, Section 11, Missouri Constitution. Baumli v. Howard County, 660 S.W.2d 702 (Mo. banc 1983). We do not opine on whether Section 50.332, RSMo Supp. 1984, is constitutional.

Section 105.300(4), RSMo Supp. 1984, defines the term "employment" as follows:

> When used in section 105.300 to 105.440, the following terms mean:
>
> * * *
>
> (4) "Employment", any service performed by any employee of the state or any of its political subdivisions or any instrumentality of either of them, which may be covered, under applicable federal law, in the agreement between the state and the Secretary of Health, Education and Welfare, except services, which in the absence of an agreement entered into under sections 105.300 to 105.440 would constitute "employment" as defined in section 210 of the Social Security Act (42 U.S.C.A. § 410); any services performed by an employee as a member of a coverage group, in positions covered by a retirement system on the date such agreement is made applicable to such coverage group, which retirement system is supported wholly or in part by the state or any of its instrumentalities or political subdivisions, shall not be considered as "employment" within the meaning of sections 105.300 to 105.440; however, service which under the Social Security Act may be included only upon certification by the governor in accordance with section 218(d)(3) of that act shall be included in the term "employment" if and when the governor issues, with respect to such service, a certificate to the Secretary of Health, Education and Welfare pursuant to section 105.353; [Emphasis added in part.]

Section 105.300(2), RSMo Supp. 1984, defines the term "employee" as follows:

> When used in section 105.300 to 105.440, the following terms mean:
>
> * * *
>
> (2) "Employee", elective or appointive officers and employees of the state, including

> members of the general assembly, and elective or appointive officers and employees of any political subdivision of the state, including county officers remunerated wholly by fees from sources other than county funds, or any instrumentality of either the state or such political subdivisions; and employees of a group of two or more political subdivisions of the state organized to perform common functions or services; [Emphasis added in part.]

42 U.S.C.S. Section 410(7) (L.Ed. 1973 and Supp. 1984) defines the term "employment". We find no applicable exception covering this employment and conclude, as has the Social Security Administration, that the employment in question is "employment" for social security purposes. There is no basis to conclude that this compensation is self-employment income. See, State of Montana v. United States, 489 F.2d 522 (9th Cir. 1973).

Sections 105.370 and 105.375, RSMo 1978, state:

> 105.370. -- 1. Each political subdivision or instrumentality whose plan has been approved under section 105.350 shall pay to the trustee with respect to wages at such times as the state agency may prescribe contributions in the amounts and the rates specified in the agreement entered into by the state agency.
>
> 2. Each political subdivision or instrumentality required to make payments under sections 105.300 to 105.440 is authorized, in consideration of the employee's retention in, or entry upon, employment after the passage of sections 105.300 to 105.440, to impose upon its employees, as to services which are covered by an approved plan, a contribution with respect to wages, not exceeding the amount of the employee tax which would be imposed by the Federal Insurance Contributions Act (26 U.S. C.A. § 1400) and to deduct the amount of the contributions so collected shall be paid to the trustee in partial discharge of the liability of the political subdivision or instrumentality. Failure to deduct the contribution shall not relieve the employee or employer of liability therefor.

> 105.375. -- Any county officer who is compensated wholly by fees derived from sources other than county or state moneys shall pay into the county treasury out of fees received by him amounts equal to the contributions required to be paid by the county under section 105.370 and shall collect from all deputies, assistants and employees in his office and turn over to the officer or agent of the county charged with the payment thereof to the state agency the amounts required to be collected and paid under section 105.370.

The term "wages" is defined in Section 105.300(12), RSMo Supp. 1984, as follows:

> When used in Sections 105.300 to 105.440, the following terms mean:
>
> * * *
>
> (12) "Wages", all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than cash, except that the term shall not include that part of such remuneration which, even if it were for "employment" within the meaning of the federal Insurance Contributions Act, would not constitute "wages" within the meaning of that act. The term "wages" shall not include the amount of any payment made on account of sickness or accidental disability under a plan or system approved by the state agency.

The answer to the first question presented is that compensation received pursuant to Sections 50.332 or 52.430.3, RSMo Supp. 1984, is "wages" for social security purposes.

The second question presented deals with the responsibility for reporting; i.e., are the contract services performed in the capacity of a county or city employee. We believe the common law control test should be applied to determine whether the services are performed in the capacity of a county or city employee. As Section 50.332, RSMo Supp. 1984, requires the contract to be approved by the governing body of the county, we believe the county controls the employment, and the collector's or other official's services are performed in the capacity of a county employee

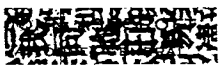
for social security purposes. Therefore, the county should report Section 50.332 contract services for social security purposes. Section 52.420.3, RSMo Supp. 1984, does not expressly contain any such approval mechanism, however, the requirement of approval of the contract by the county commission appears to be implied. This subsection specifically provides that the payment for these contract services is from the county treasury. We believe that payment is an additional indication of control. Accordingly, the county should report Section 52.420.3 contract services for social security purposes.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

WILLIAM L. WEBSTER
ATTORNEY GENERAL



Attorney General of Missouri

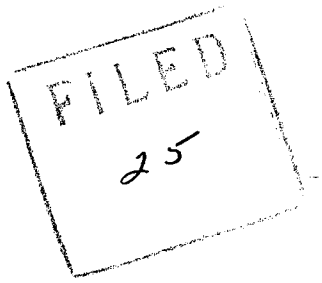
POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

DIRECT DIAL: (314) 751-3321

March 11, 1985

OPINION LETTER NO. 25-85

The Honorable William J. Fleischaker
Jasper County Prosecuting Attorney
Jasper County Courts Building
6th and Pearl
Joplin, Missouri 64801



Dear Mr. Fleischaker:

This letter is in response to your question asking:

> May a county court permit a savings and loan association to bid to be a depository of county funds pursuant to Sections 110.130 through 110.150 RSMo., and may a savings and loan association be awarded the contract as depository if its bid is accepted.

Sections 110.130 to 110.150, RSMo 1978 and RSMo Supp. 1984, authorize county courts to enter into depositary contracts with "banking corporations or associations" at the county seat upon a competitive bid procedure. See also Sections 52.020 and 52.360 to 52.400, RSMo 1978 and Supp. 1984. The "banking corporation or association" language in the County Depositary Law appears to have originated in 1889 Mo. Laws 81-83. Missouri-chartered savings and loan associations are organized under Chapter 369, RSMo 1978 and RSMo Supp. 1984. Chapter 369, RSMo 1978 and RSMo Supp. 1984, appears to have as its earliest ancestor the Building and Loan Association Law enacted at S.B. 96, 1897 Mo. Laws 91-94. The "banking corporation or association" language that originated in 1889 could hardly have included a type of organization first recognized by the laws of Missouri in 1897.[1]

---

[1] In Opinion No. 69-83 this office concluded that the State Treasurer may not deposit state funds in savings and loan associations, because the term "banking institution" in Article IV, Section 15, Missouri Constitution, does not include savings and loan associations.

However, Section 369.194, RSMo Supp. 1984, states:

> 1. Accounts in insured associations are legal and proper investments or depositaries for fiduciaries of every kind and nature, all political subdivisions or instrumentalities of this state, insurance companies, business and nonprofit corporations, charitable or educational corporations or associations, all financial institutions of every kind and character, all pension, endowment and scholarship funds both public and private, and each and all of them may invest funds in accounts in such associations. The director of the division of savings and loan supervision shall by regulation permit associations to pledge funds or assets in connection with the investment of public funds in accounts of associations, and may provide that accounts in associations shall be legal investments for any persons, firms, corporations or entities not herein specifically referred to. Notwithstanding anything to the contrary, accounts prohibited to a mutual association are prohibited to a capital stock association.
>
> 2. Notwithstanding any restrictions or limitations contained in any other law of this state, accounts in any association may be accepted by any agency, department or official of the state of Missouri in any case wherein such agency, department or official acting in its or his official capacity requires that securities be deposited with such agency, department or official. [Emphasis added.]

In Opinion No. 82, Sims, 1959 (withdrawn), this office took the position that Section 369.325, RSMo Supp. 1957, a predecessor of the statute quoted above, was invalid as contravening the prohibition in Article VI, Section 23, Missouri Constitution, against political subdivisions owning or subscribing for stock in any corporation or association. At the time, it appeared that most, if not all, savings and loan associations were "mutual" associations. Although capital stock associations are now authorized, Section 369.194.1, RSMo Supp. 1984, states in part: "Notwithstanding anything to the contrary, accounts prohibited to a mutual association are prohibited to a capital stock association." In Opinion No. 148, White, 1970, this office reversed its decision in

the 1959 opinion and concluded that Section 369.325, RSMo 1969, was constitutional. Implicit in the holding of that opinion was our conclusion that counties may invest funds in insured savings and loan associations. The courts have not yet addressed the issue. See City of Jackson v. Heritage Savings and Loan Association, 639 S.W.2d 142 (Mo.App. 1982). Since our 1970 opinion was issued, we have relied on Section 369.194.1, RSMo Supp. 1973, by finding that school districts may use savings and loan associations as depositaries. Opinion No. 62, Mallory, 1975.

Statutes must be read in pari materia. Where one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them the specific governs over the general. State ex rel. Fort Zumwalt School District v. Dickherber, 576 S.W.2d 532, 536-537 (Mo.Banc 1979).

Here, we find no conflict. Sections 110.130 to 110.150, RSMo 1978 and RSMo Supp. 1984, authorize county depositary contracts with banking corporations or associations. Section 369.194, RSMo Supp. 1984, merely expands or enhances this power by authorizing counties to make depositary contracts with savings and loan associations. Reading these provisions in harmony, we conclude that Section 369.194, RSMo Supp. 1984, and Sections 110.130 to 110.150, RSMo 1978 and RSMo Supp. 1984, authorize county depositary contracts with savings and loan associations.

Therefore, it is our view that county depositary contracts with insured savings and loan associations are authorized.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

WILLIAM L. WEBSTER
ATTORNEY GENERAL

Attorney General of Missouri

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321
DIRECT DIAL:

February 14, 1985

OPINION LETTER NO. 26-85

FILED
26

The Honorable Roger Wilson
Senator, District 19
State Capitol Building, Room 227
Jefferson City, Missouri 65101

Dear Senator Wilson:

This letter is in response to your request for an opinion of this office asking:

> Whether SB 601 authorized prosecutors the full amount of the additional compensation in 1984 or whether the amount of the additional compensation for prosecutors must be prorated in that year, as was explicitly provided for with respect to the other county officials who were authorized additional compensation by SB 601.

The section to which you refer is Section 56.790.1, RSMo Supp. 1984, effective August 13, 1984, which provides that in second class counties (to which you refer) not having facilities which are operated by the Department of Corrections and Human Resources with a total average yearly inmate population in excess of 2,000 persons, the additional compensation of the prosecuting attorney will be "ten thousand dollars per year". Since the law clearly states that the compensation is to be paid on an annual basis we are of the view that the compensation should be prorated for the year 1984.

In addition, we point out that, under Section 56.790.4 if the moneys which are collected and deposited would be exhausted by the payment of all claims allowed during any calendar year, the amount shall be prorated.

We understand that the position of the Office of Administration as stated in their letter to all County Clerks dated November 1, 1984, is consistent with the views that we express in this opinion. That is, the compensation provided the

prosecuting attorneys for 1984 under such provisions is prorated for 1984 and is contingent upon appropriations and adequate funding in the Missouri Prosecuting Attorneys Fund.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

July 11, 1985

OPINION LETTER NO. 27-85

Honorable Anthony D. Ribaudo
State Representative, 65th District
State Capitol, Room 309
Jefferson City, Missouri 65101

FILED
27

Dear Representative Ribaudo:

This letter is in response to your request for an opinion of this office asking the following question:

> How do you effect a partial release on a Deed of Trust with a future advance clause when no note is presented at the time of original record and the law on partial release requires a note to be presented?

The elaborate statute relating to deeds of trust containing future advances or obligations clauses, § 443.055, RSMo includes these provisions:

* * *

> 2. Instruments [e.g., mortgage or deed of trust] may secure future advances or other future obligations of a borrower to a lender, made or incurred within ten years after the date such instruments are executed, ... The future advances or future obligations may be evidenced by one or more notes . . . evidencing indebtedness of the borrower to the lender, which . . . shall not be required to be executed or delivered prior to the date of the instrument securing them. . . . The fact that an instrument secures future instruments or future obligations shall be clearly stated on the face of the instrument . . . and the instrument shall state the total amount of the obligations which may be secured. . . .

* * *

> 6. As to any third party who may acquire any rights in or lien upon the encumbered real property, the priority of the lien securing any such future advances or other future obligations shall date from the time the instrument is filed of record, whether . . . any third party has actual notice of any such advances or additional obligations. . . .
>
> 7. At any time subsequent to the execution of an instrument, the borrower may send a notice to the lender . . . stating therein that the borrower elects to terminate the operation of the instrument as security for future advances or future obligations made or incurred after the date the lender receives the notice . . . [T]he lender shall . . . file of record . . . a statement referring to the original instrument, legally describing the real property therein, setting forth the fact of receipt of the borrower's notice, . . . and stating the total principal amount as of the date it [the lender] received the borrower's notice of all outstanding debts and obligations secured by the instrument. No advances made by the lender to the borrower after the date the lender receives the notice . . . shall be secured by the instrument, and the total debts so secured shall be limited in principal amount to the amount stated by the lender in its recorded notice by which statement the lender will be irrevocably bound. . . . Should the lender fail to file the statement . . ., the borrower may file a similar statement, and the lender shall be irrevocably bound by the borrower's statement of the total principal amount of the outstanding debt and other obligations secured by the instrument, so long as the borrower's statement is made in good faith . . .,
>
> * * *
>
> 11. Identification of documents evidencing debts under which future advances or future obligations are to be made, secured by an instrument, need not be presented to the recorder in accordance with sections 443.040 and 443.050, nor shall such document evidencing indebtedness need to be presented for cancellation in the presence of the recorder in accordance with section 443.060, when a full deed of release of a deed of trust securing future advances or future obligations is presented for recording.

> 12. No future advance or future obligation shall be secured by an instrument . . . unless the note . . . or other evidence of indebtedness . . . shall state on its face that such note . . . or other evidence of indebtedness is secured by such instrument. . .
>
> * * *
>
> § 443.055 (H.B. No. 1409, 82nd G.A.; L.Mo. 1984, pp. 697-700).

The other statutes to which reference is made in Subsection 11 of the just quoted statute, to wit; §§ 443.040, -.050, and -.060, provide as follows:

> 1. Hereafter when any mortgage or deed of trust or other lien to secure the payment of any specific obligation is created on real estate by an instrument to be filed in the office of the recorder of deeds . . ., the instrument evidencing such debt or debts or obligations so secured may be presented to the recorder . . . and the recorder shall . . . stamp or write upon such note, or other promissory evidence of debt so secured, an identification thereof as being the note or other evidence of debt described by such security instrument.
>
> * * *
>
> 3. In certifying to releases where the secured instruments have been so identified, the recorder shall certify that such identified instruments were produced and canceled or properly noted, as the case may be. § 443.040 (S.B. No. 447, 45th G.A.; L.Mo. 1909, pp. 698-699) (emphasis added)
>
> 1. In all cities in this state which now have or may hereafter have six hundred thousand inhabitants or more, and in all counties of class one and two, when any mortgage or deed of trust or other instrument intended to create a lien upon the real estate to secure the payment of a debt or obligation evidenced by an instrument or instruments in writing, shall be filed for record, the instrument or instruments representing the principal of such debt or obligation or any part thereof shall be presented to the recorder of deeds . . . and the recorder shall . . . stamp or write upon each such instrument evidencing principal

[sic] so secured an identification thereof as being a note, bond or other evidence of debt described by such mortgage, deed of trust or other instrument of security.

* * *

3. In certifying to releases where the secured instruments have been so identified, the recorder shall certify that such identified instruments were produced and canceled or properly noted, as the case may be.

* * *

§ 443.050 (S.B. No. 109, 57th G.A.; L.Mo. 1933, pp. 191-192) (emphasis added)*

1. If any mortgagee, cestui que trust, or assignee . . . receive full satisfaction of any mortgage or deed of trust, he shall . . . acknowledge satisfaction . . . on the margin of the record thereof, or deliver to . . . [the maker] . . . a sufficient deed of release . . . [W]hen any mortgage or deed of trust shall be satisfied by a deed of release, the recorder shall note on the margin of the record of such deed of trust the book and page where such deed of release is recorded. In case satisfaction be acknowledged by the payee or assignee, or in case a full deed of release is offered for record . . ., the note or notes secured shall be produced and canceled in the presence of the recorder, who shall enter that fact on the margin of the record and attest the same with his official signature; . . . [N]o full deed of release shall be admitted to record unless the note or notes are so produced and canceled. . . .

2. If such note or notes are not presented for cancellation for the alleged reason that they have been lost or destroyed, the recorder, before allowing any entry of satisfaction to be made on the record or any deed of release to be placed on the file or record, shall require the cestui que trust . . . or his legal repre-

* The population of the City of St. Louis in 1933 was 821,960. No other Missouri city, then or now, has surpassed a population of 600,000.

> sentative, to make oath, in writing, stating that the note or other evidences of debt have been paid and delivered to the maker thereof or his representative, and the recorder shall also require the maker thereof of such note or notes, or his legal representative, to make affidavit . . . that the note or notes in question have been paid, and cannot be produced because lost or destroyed, . . .
>
> 3. In case any mortgagee, cestui que trust or assignee . . . shall desire to release the property described in any deed of trust without receiving full satisfaction of the debt, note or obligation thereby secured, he shall be permitted to do so by presentation to the recorder of the notes or other obligations evidencing the principal of the debt secured thereby, or accounting for them by affidavits . . . as . . . in the case of full release, and the recorder shall note the fact of such full release on the margin of the record of such deed of trust or, if such release is made by deed of release, shall note the fact of the filing for record of such release, and of the presentation of such notes or other obligations, or accounting therefor, on such notes or obligations . . . but shall not cancel such notes or other obligations; . . . § 443.060*

Your question alludes to the "law on partial release",** which we suppose is a reference to §§ 443.090, -.100, and -.110, which provide:

> In case any person desires to release any part of the property described in any deed of trust or mortgage by marginal record or deed of release, he shall be per-

* The essential concept of this statute is quite old. See L. Mo. 1835, p. 210. The substantial form of the present statute appears to date from L. Mo. 1887, pp. 224-225. The last repeal and reenactment of this statute was in H.B. No. 226, 78th G.A. (L.Mo. 1975, pp. 391-396).

** The black letter title to § 443.060, RSMo is Acknowledgment of satisfaction and release, how made - Partial release, how made. The last four words were (misleadingly, we think) added to this title in H.B. No. 226 of 1975 evidently because of the addition of subsection 3 to the statute allowing the owner of the land securing a debt to release the security of the land even though the debt itself remained.

> mitted to do so by the recorder on presentation to the recorder of the notes or other obligations evidencing the principal of the debt secured thereby, or accounting for them by affidavits . . . as . . . in the case of full release, and the recorder shall note the fact of such partial release on the margin of the record of such deed of trust or, if such release is made by deed of release, shall note the fact of the filing for record of such partial release, and of the presentation of such notes or other obligations, or accounting therefor, on such notes or other obligations . . . and on the margin of the record of such deed of trust or mortgage, but shall not cancel such notes or other obligations; . . . § 443.090*
>
> In cases where a number of notes are named in any mortgage or deed of trust, on payment of any one or more of such notes, the maker thereof may present the same to the recorder, and the recorder shall cancel the same and make a memorandum of such presentation and cancellation on the margin of the record of such mortgage or deed of trust. § 443.100*
>
> Whenever any mortgage or deed of trust . . . providing for the issue of a series of notes or bonds aggregating one hundred thousand dollars or more . . . secured in whole or in part by property located in this state, . . . confers authority upon the trustee . . . to release the property or any part thereof encumbered by any such mortgage or deed of trust from the lien thereof, such release may be so made and it shall be the duty of the recorder of deeds . . . to accept and record in the proper records any deed of release executed . . . by such trustee . . . without the notes or bonds secured by such note or deed of trust being produced; . . . § 443.110 (S.B. No. 74, 47th G.A.; L.Mo. 1913, pp. 162-163)

The legislation condoning (§ 443.040) or requiring (§ 443.050) the presentation to the recorder of deeds of the document evidencing the indebtedness (e.g., promissory note) which is being secured by a deed of trust (mortgage) on land in this state was presumably inspired by a concern for a mechanism whereby the deed of trust could only be cancelled upon the authority of the current owner of the indebtedness (§ 443.060). In Lee v. Clark and others, 1 S.W. 142 (Mo. 1886), the Missouri Supreme Court observed:

---

* The substantial form of these statutes dates from at least as early as L. Mo. 1897, p. 203.

> The simple question for determination is, can the payee of a note secured by a deed of trust, after he has assigned the note, discharge the property of the lien, as between a bona fide purchaser of the property and the assignee of the note, by entering satisfaction of the debt, on the margin of the record, or otherwise. It has been repeatedly and uniformly held in this state that the assignment of a note before maturity, secured by a deed of trust, carries the trust as an incident. . . . 1 S.W. at 143
>
> . . . These recent decisions are in harmony with those which held that the security passed as an incident with the assignment of the note, and are decisive of the question involved in this case; and to the question, what shall one desiring to purchase do under such circumstances as are disclosed by this record? The answer is, let it alone until he can ascertain who holds the note. He is under no obligation to buy, and prudence would dictate that he should not buy until satisfied that the owner of the note had entered satisfaction of the debts. It may embarrass persons desiring to purchase, and it might be well for the legislature to require a memorandum of the assignment of the note to be entered upon the margin of the deed of trust or mortgage. 1 S.W. at 144

Similarly, the court in Hagerman v. Sutton, 4 S.W. 73 (Mo. 1887) remarked:

> . . . When plaintiff purchased the note, the mortgage passed with it as an incident thereto. . . . And when a note is underdue when transferred, and is negotiable, the presumption arises of want of notice, ... The mortgage, being the incident, partakes of the negotiability of its principal, to wit, the note, without any formal assignment or delivery, or even mention, of the former. But for the note, the mortgage never would have existed. It owes its birth and being to the note, and ceases to exist when the latter is discharged.
>
> . . . Prima facie he took the mortgage, as he took the note, upon the same footing of equity, and with the same rights, that equity accords to both instruments. No hidden lien, undisclosed priority, or secret trust, between Downing [mortgagee-assignor]

> and any third person could affect his interests, or his claims, to full satisfaction out of the mortgaged premises. . . .
>
> . . . [A]fter Downing parted with his title to the note, it was out of his power to release any portion of the mortgaged premises. . . . 4 S.W. at 78

The statutory mechanism designed to insure that only the present owner of an indebtedness secured by land authorize the cancellation (release) of a deed of trust (§ 443.060) is not foolproof, as witnessed in Ripley National Bank v. Connecticut Mutual Life Insurance Co. et al., 47 S.W. 1 (Mo. 1898):

> . . . It appeared clearly upon the trial that this pretended note was a forgery, prepared and produced for the purpose for which it was used, and that the release was executed, and the recorder's attestation was procured, while the genuine note was in the plaintiff bank in Ohio. . . . 47 S.W. at 3
>
> . . . That the respondent [Ripley], as indorsee and holder of the note, was the real cestui que trust, and the only party authorized by law to release the deed of trust on the margin of the record thereof, is beyond question. Rev. St. 1889, § 7094. That the release was not executed by the respondent, through or by any of its officers or agents acting for it, or by any person assuming to act for it, or in its name, and that C. Newkirk and J. C. Thompson [payees-indorsers], who signed the release, in their own names and for themselves, had no power to release the deed of trust, is also beyond question. Why, then, should not this void release be canceled and set aside? The answer to this question returned by the appellant [maker-mortgagor] is that the debt to secure which the deed of trust was given has been paid by the appellant and he is entitled to have satisfaction entered of record formally by the respondent. . . . 47 S.W. at 5
>
> . . . [W]hen Thompson, instead of remitting the amount of respondent's debt to it, at Ripley, and charging the same to appellant's account, as he had been authorized by appellant to do, converted the same to his own use, . . .; and thus it turned out, by the malfeasance of the appellant's own agent, to whom he had given the power and to whom he had intrusted the duty of paying off this debt, the same was not paid by the

> appellant, nor by any person for him. . . . The appellant's defense of payment failed along the whole line. . . . 47 S.W. at 6

A similar situation was described by the court in Cooper v. Newell et al., 172 S.W. 326 (Mo. 1914):

> . . . This amendment does not authorize anyone to enter satisfaction who was not previously authorized to do so. It simply attempts to guard against a false release by the cestui que trust named in the mortgage by requiring of him and of the maker affidavits which, if falsely made, subject affiant to the pains and penalties of perjury. Had the legislature intended by this provision to authorize anyone other than the lawful holder of a note to release a deed of trust or mortgage securing it, it could easily have said so. Until it does plainly say so, this court ought not by strained construction torture a meaning from the statute which the language does not justify and which would put an end to the negotiation of notes secured by mortgages and deeds of trust except in cases in which buyers of such notes were willing to take them at the risk of losing the security in case the cestui que trust and maker of the note ignorantly or fraudulently made the statutory affidavits and entered satisfaction. 172 S.W. at 328-329

We perceive no reason why the legislature cannot prospectively alter or abolish the traditional statutory mechanism which was designed to assure that a deed of trust could only be released by the current owner of the secured indebtedness. The 1933 legislation relating to any indebtedness exceeding One Hundred Thousand Dollars ($100,000) secured by land eliminated the requirement that the document evidencing the indebtedness be presented for inspection or cancellation or notation by the recorder at the time of release of the deed of trust. § 443.110. It appears that, wisely or not, the 1984 legislation (§ 443.055) has abolished any requirement that, in the case of a deed of trust securing future monetary advances from the beneficiary (cestui que trust) to the grantor, the document evidencing the indebtedness ever be presented for inspection or notation by the recorder of deeds, whether at the time such deed of trust is first placed of record or at such later time as it is fully released of record.

However, since Subsection 11 of § 443.055 does not specifically or expressly exempt deeds of trust securing future advances or obligations from the provisions of §§ 443.090 and -.100 relating to partial releases of deeds of trust, we believe that to partially

release a deed of trust bearing a future advances or obligations clause, it is necessary to produce for inspection and notation (.090) or cancellation (.100) by the recorder any and all documents evidencing the indebtedness (or an affidavit accounting for them) secured by such deed of trust. This result is perhaps anamolous, given that such documentary evidence of the indebtedness may never have been seen by the recorder prior to the act of partial release of the deed of trust, but this, we feel, is a matter for the legislature to address and change or correct.

Therefore it is our view that subsection 11 of § 443.055, eliminates the presentment requirement only when a full deed of release of a deed of trust securing future advances or obligations is presented for recording. A partial release of a deed of trust with a future advance clause can only be effected if the note or an appropriate affidavit is presented to the recorder pursuant to § 443.090.*

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

* We make no representation as to the weight to be accorded any particular release, and the degree of reliance thereon should be a matter of judgment and discretion on the part of the prospective purchaser of the affected property.

Attorney General of Missouri

WILLIAM L. WEBSTER
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

DIRECT DIAL: (314) 751-3321

March 15, 1985

OPINION LETTER NO. 31-85

FILED
31

The Honorable J. R. Strong
Senator, District 6
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Strong:

This letter is in response to your request for an Attorney General's opinion regarding whether an anticipated promotion of the Central Missouri Citizen Band Radio Club constitutes an unlawful lottery under the laws of the State of Missouri.

It is our understanding that Central Missouri Citizen Band Radio Club is a not-for-profit Missouri organization comprised of citizen band radio operators in the State of Missouri. We further understand that the organization anticipates conducting a "Coffee Break Jamboree" on June 9, 1985, for members of the club and the public at large, at which time prizes will be awarded based upon a random drawing from tickets.

As set forth in the opinion request, the anticipated promotion will be conducted in one of four ways:

"1. Where no purchase or contribution or donations is necessary to enter, and those attending, may register their names for free, and as they register they are given a ticket and the companion ticket is placed in a drum from which during the day tickets are drawn out by random and any person holding the duplicate ticket called by number will be entitled to a door prize.

2. Members of the public attending the Jamboree will be charged an entrance fee which would entitle them to a then free cup of coffee or right to see the booths, tables where crafts are being sold, and socialize with other members of the public who desire to attend. Prizes would be given

away during the day by drawing a duplicate ticket from a drum, which would be a copy of a ticket given to any member of the public attending free that would ask for one, a duplication of it being placed in a drum from which tickets would be drawn out by random to pick a winner.

3. In addition to giving a free ticket to any member of the public attending, including any members, placing the duplicate in a drum from which winning numbers would be drawn for prizes, donations would be solicited from those attending, prior to the Jamboree, at the Jamboree, and after the Jamboree, all three instances or only one, as any person may want to donate, and a receipt would be given for any donations, but no such receipt or stub would be placed in any drum from which a winning number might be drawn. Only the free tickets, no contribution required, duplicates would be allowed to be placed in the drum from which winning numbers would be selected for door prizes.

4. In addition to giving any member of the public a free ticket, including any members attending, from which winning numbers might be drawn for door prizes, donations would be suggested upon the basis of selling tickets for 3 for $1.00, and a duplicate ticket showing such donations would likewise be placed in the drum along with the free tickets from which a winning number would be drawn for a winner which might go to a person with a free ticket or maybe to a person who made a donation by buying 3 tickets for $1.00 method."

The pertinent provision of our State's Constitution that concerns lotteries and gift enterprises is Article III, Section 39(9). That section provides:

> The general assembly shall not have power:
>
> * * *
>
> (9) to authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; except that, nothing in this section shall be construed as to prevent or prohibit citizens of this state from participating in games or contests of skill or chance where no consideration is required to be given for the privilege or opportunity of participating or for receiving the award or prize and the term "lottery or gift enterprise" shall mean only those games or contests whereby money or something of value is exchange

> directly for the ticket or chance to participate in the game or contest. The general assembly may, by law, provide standards and conditions to regulate or guarantee the awarding of prizes provided for in such games or contests under the provision of this subdivision.

Moreover, pursuant to Section 572.010(7), RSMo 1978, a lottery is defined as "an unlawful gambling scheme in which for a consideration the participants are given an opportunity to win something of value, the award of which is determined by chance."

In all four of the promotional alternatives presented in your opinion request, it is apparent that at least two of the three elements of a lottery are present: a prize ("door prize") and chance (random drawing). The remaining issue is whether the promotion contains the third element of "consideration."

In the first promotional alternative, since the participants in the contest are not required to give any money or anything of value for the right to participate in the program, the element of consideration is not present in the program and, therefore, a lottery is not present.

In the second hypothetical promotion, it is our understanding that members of the public are either charged an admission fee to attend the event, or admitted free of charge at the option of the consumer and both are provided numbered tickets. Furthermore, paying and nonpaying consumers have equal chances of winning prizes in the random drawing. Based upon these facts, consideration is not mandatory for the right to participate in the contest and, therefore, it does not constitute an unlawful lottery.

Again, in the third alternative, since "money or something of value" is not exchanged for the tickets from which the random selection is made, the element of consideration is not present and the promotion does not constitute a lottery.

In the fourth alternative, however, we are of the opinion that a portion of the promotion constitutes an unlawful lottery. The providing and placing of the free tickets in the drum from which the drawing is made is lawful as set forth above. However, the act of selling tickets

three for one dollar and commingling those ticket stubs with the free ones for the random drawing constitutes an unlawful lottery. The persons purchasing the three tickets for one dollar would have a greater chance of winning the prizes. Therefore, we must conclude that the fourth promotional alternative constitutes an unlawful lottery under our state laws.

Very truly yours,

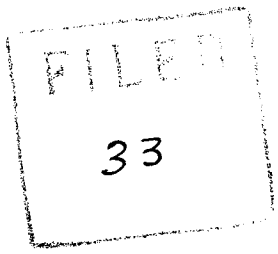
William L. Webster

WILLIAM L. WEBSTER
Attorney General

WILLIAM L. WEBSTER
ATTORNEY GENERAL

Attorney General of Missouri

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102



DIRECT DIAL: (314) 751-3321

February 22, 1985

OPINION LETTER NO. 33-85

The Honorable Fred Dyer
Senator, District 2
State Capitol Building, Room 431
Jefferson City, Missouri 65101

Dear Senator Dyer:

This letter is in response to your question asking whether a former member of the Board of Equalization of St. Charles County, Missouri, a first class county, who served on the Board during the year of 1984, is prohibited from assisting or rendering services to the board for compensation as a special counsel assigned by the County Counselor of St. Charles County on such legal issues as county-wide reassessment or other matters coming before that board under Section 105.462.1(3), RSMo 1978.

Section 105.462.1(3), RSMo 1978, relates to a prohibition on former board members from performing for one year "after termination of his employment any service for compensation for any person, firm or corporation to influence the decision or action of the agency with which he served as a member; provided, however, that he may, after termination of his office or employment, perform such service for consideration in any adversary proceeding or in the preparation or filing of any public document or conference thereon unless he participated directly in that matter or in the receipt or analysis of that document while he was serving as a member."

The prohibition in that statute does not apply to the hiring by the County Counselor of a former member of the Board of Equalization of St. Charles County to serve as an attorney for that board. The prohibition appears to relate to a former board member being hired by a third party or firm or corporation in an effort to appear before that board and influence a decision or action of the board within one year after the termination of his previous service with the board. Essentially we do not believe that the provision is applicable to the circumstances which you describe. We further believe that this prohibition does not

apply with regard to appeals by taxpayers which would come before the Board of Equalization under the specific circumstances in your inquiry.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

CIRCUIT CLERK AND
EX OFFICIO RECORDER OF DEEDS:
CIRCUIT CLERK:
CIRCUIT COURT -- CIRCUIT COURTS:
CIRCUIT COURT CLERK AND
RECORDER OF DEEDS:
LEGAL EXPENSE FUND:
BONDS:

(1) Elected circuit clerks other than the Circuit Clerk of the City of St. Louis are under the provisions of the State Legal Expense Fund; (2) the Circuit Clerk of the City of St. Louis, the Circuit Clerk of St. Louis County, and the Court Administrator of Jackson County are not under the provisions of the State Legal Expense Fund; (3) circuit clerks ex officio recorders of deeds are under the provisions of the State Legal Expense Fund except to the extent that they are performing duties as recorders of deeds; (4) deputy and division clerks are under the provisions of the State Legal Expense Fund to the extent that they are performing duties on behalf of the State and not recorder of deeds functions; (5) claims involving a circuit clerk's bond are not covered by the State Legal Expense Fund; (6) the ultimate question of whether coverage is provided any State officer or State employee depends on the facts of the particular case.

April 23, 1985

OPINION NO. 34-85

FILED
34

The Honorable William E. "Bud" Lewis
Representative, District 107
State Capitol Building, Room 412
Jefferson City, Missouri 65101

Dear Representative Lewis:

This opinion is in response to your questions asking:

a. Are elected circuit clerks covered under the provisions of the State Legal Expense Fund?

b. Are elected circuit clerk ex-officio recorders of deeds covered under the provisions of the State Legal Expense Fund for acts required of the office of circuit clerk?

c. Are elected circuit clerk ex-officio recorders of deeds covered under the provisions of the State Legal Expense Fund for acts required of the office of recorder of deeds?

d. Are appointed court administrators in St. Louis County and Jackson County,

whose salaries are partially reimbursed by the state (see Section 483.015), covered under the provisions of the State Legal Expense Fund?

e. Is the elected circuit clerk in the City of St. Louis, who is a city employee but whose salary is partially reimbursed by the state (see Section 483.015), covered under the provisions of the State Legal Expense Fund?

f. Are other county paid employees hired by the Circuit Court en banc or other judicial officer to perform judicial related duties covered under the provisions of the State Legal Expense Fund?

g. Are errors and omissions of a circuit clerk or state paid deputy clerk when handling funds which are not deposited in state general revenue (e.g. 20% county share of court costs, child support reimbursement, fines, etc.) covered under the provisions of the State Legal Expense Fund?

h. Are deputy circuit clerks who are entirely state paid covered under the State Legal Expense Fund for errors and omissions occurring while performing recorder of deeds duties?

Section 105.711.2(2), RSMo Supp. 1984, states:

> 2. Moneys in the state legal expense fund shall be available for the payment of any claim or any amount required by any final judgment rendered by a court of competent jurisdiction against:
>
> * * *
>
> (2) Any officer or employee of the state of Missouri or any agency thereof, including, without limitation, elected officials, appointees, members of state boards or commissions and members of the Missouri national guard upon conduct of such officer

> or employee arising out of and performed in connection with his or her official duties on behalf of the state, or any agency thereof, provided that moneys in this fund shall not be available for payment of claims made under chapter 287, RSMo. [Emphasis added.]

Section 483.015.1, RSMo Supp. 1984, states that all circuit clerks are elected to office in each county and the City of St. Louis, except as otherwise provided by law. Subsection 2 of Section 483.015, RSMo Supp. 1984, provides that the Court Administrator of Jackson County and the Circuit Clerk of St. Louis County shall be selected as provided by county charter. Circuit clerks ex officio recorders of deeds are provided for in Sections 59.040, 59.050 and 59.090, RSMo 1978. The appointment of deputy and division clerks is provided for in Section 483.080, RSMo 1978, and Section 483.245, RSMo Supp. 1984.

Subsection 7 of Section 483.083, RSMo Supp. 1984, as enacted by Senate Bill No. 581 (effective January 1, 1985), states in part:

> 7. . . . The compensation of all circuit clerks shall be paid by the state and they shall be considered state employees for all purposes except the manner of their selection, appointment or removal from office; except that, the circuit clerk of the city of St. Louis, the circuit clerk of St. Louis County and the court administrator of Jackson County shall continue to be paid by the city and those counties and shall not become state employees, but the city of St. Louis, St. Louis County and Jackson County shall each be paid an amount which is equivalent to a circuit clerk's salary as provided in subsection 3 of section 483.015. [Emphasis added.]

See, also, Section 483.084, RSMo Supp. 1984.

This statute clearly states that all circuit clerks other than the Circuit Clerk of the City of St. Louis, the Circuit Clerk of St. Louis County, and the Court Administrator of Jackson County are state employees. Accordingly, such circuit clerks come within the provisions of the State Legal Expense Fund. The Circuit Clerk of the City of St. Louis, the Circuit Clerk of St. Louis County, and the Court Administrator of Jackson County are not state employees and are not under the State Legal Expense Fund.

To the extent circuit clerks ex officio recorders of deeds are performing functions in their capacity as circuit clerks, such officials are considered state employees pursuant to subsection 7 of Section 483.083, RSMo Supp. 1984, and are under the provisions of the State Legal Expense Fund. When such officials are performing functions in their capacity as recorders of deeds, they are not performing duties "on behalf of the state" within the meaning of Section 105.711.2(2), RSMo Supp. 1984. Therefore, to the extent circuit clerks ex officio recorders of deeds are performing functions in their capacities as recorders of deeds, such officials are not under the provisions of the State Legal Expense Fund. The same reasoning would apply to deputy circuit clerks performing recorders of deeds' duties.

Deputy and division clerks are considered state employees. Section 483.245.3 and .6, RSMo Supp. 1984. Accordingly, they are under the provisions of the State Legal Expense Fund.

You have asked about the State Legal Expense Fund coverage of county-paid judicial employees. This question is presently being litigated in Cates v. Webster, No. CV184-703CC (Cole County Circuit Court). Therefore, we will not opine on that question here.

We note that question g. refers to claims involving the handling of funds. If a claim is covered by the circuit clerk's bond, Section 483.025, RSMo 1978, and a third party is able to recover upon that bond, see Chapter 522, RSMo 1978 and Supp. 1984, then it would appear that the State Legal Expense Fund would not apply to such claim on the basis that an applicable special statute, Section 483.025, RSMo 1978, governs over an equally applicable general statute, Section 105.711.2(2), RSMo Supp. 1984. Therefore, it is our view that the Legal Expense Fund was not intended to nullify the bonding requirements or to cover claims by the surety against the principal.

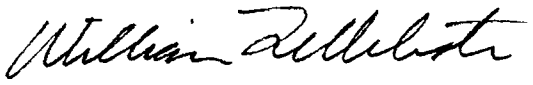
Whether coverage will be afforded to any person who comes within the provisions of the State Legal Expense Fund depends on the precise facts of the particular case.

CONCLUSION

It is the opinion of this office that, (1) elected circuit clerks other than the Circuit Clerk of the City of St. Louis are under the provisions of the State Legal Expense Fund; (2) the Circuit Clerk of the City of St. Louis, the Circuit Clerk of St. Louis County, and the Court Administrator of Jackson County are not under the provisions of the State Legal Expense Fund;

(3) circuit clerks ex officio recorders of deeds are under the provisions of the State Legal Expense Fund except to the extent that they are performing duties as recorders of deeds; (4) deputy and division clerks are under the provisions of the State Legal Expense Fund to the extent that they are performing duties on behalf of the State and not recorder of deeds' functions; (5) claims involving a circuit clerk's bond are not covered by the State Legal Expense Fund; (6) the ultimate question of whether coverage is provided any state officer or state employee depends on the facts of the particular case.

Yours very truly,



WILLIAM L. WEBSTER
Attorney General

WILLIAM L. WEBSTER
ATTORNEY GENERAL

Attorney General of Missouri

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321
DIRECT DIAL:

March 15, 1985

OPINION LETTER NO. 35-85

FILED
35

The Honorable Marvin E. Proffer
Representative, District 158
State Capitol Building, Room 306
Jefferson City, Missouri 65101

Dear Representative Proffer:

This letter is in response to your questions asking:

With regard to section 105.270, RSMo:

1. Does this provision apply when individuals volunteer for duty and consequently orders are issued?

2. What does "loss of pay" mean? Does the statute require both the public employer and the National Guard to pay full salaries during periods of guard duty?

3. May school district employees postpone their training exercises with the National Guard to summer months when school is not in session? May they be required to do this?

Section 105.270, RSMo Supp. 1984, states:

1. All officers and employees of this state, or of any department or agency thereof, or of any county, municipality, school district, or other political subdivision, and all other

public employees of this state who are or may become members of the national guard or of any reserve component of the armed forces of the United States, shall be entitled to leave of absence from their respective duties, without loss of time, pay, regular leave, impairment of efficiency rating, or of any other rights or benefits, to which otherwise entitled, for all periods of military services during which they are engaged in the performance of duty or training in the service of this state at the call of the governor and as ordered by the adjutant general without regard to length of time, and for all periods of military services during which they are engaged in the performance of duty in the service of the United States under competent orders for a period not to exceed a total of fifteen calendar days in any federal fiscal year.

2. Before any payment of salary is made covering the period of the leave the officer or the employee shall file with the appointing authority or supervising agency an official order from the appropriate military authority as evidence of such duty for which military leave pay is granted which order shall contain the certification of the officer of performance of duty in accordance with the terms of such order.

3. No member of the organized militia shall be discharged from employment by any of the aforementioned agencies because of being a member of the organized militia, nor shall he be hindered or prevented from performing any militia service he may be called upon to perform by proper authority nor otherwise be discriminated against or dissuaded from enlisting or continuing his service in the militia by threat or injury to him in respect to his employment. Any officer or agent of the aforementioned agencies violating any of the provisions of this section is guilty of a misdemeanor.

Section 41.730, RSMo 1978, states:

> 1. No person shall discriminate against any member of the organized militia or of the armed forces of the United States because of his memberhip therein.
>
> 2. No person shall prohibit or refuse entrance to any member of the organized militia of this state or of the armed forces of the United States into any public entertainment or place of amusement because such member is wearing the uniform of the organization to which he belongs.
>
> 3. No employer or officer or agent of any corporation, company or firm, or other person, shall discharge any person from employment because of being a member of the organized militia of this state or hinder or prevent him from performing any militia service he may be called upon to perform by proper authority or dissuade any person from enlistment in the organized militia by threat or injury to him in respect to his employment, trade or business, in case of his enlistment. Any person violating any of the provisions of this section is guilty of a misdemeanor.

Question No. 1

Your first question asks if a person who volunteers for national guard duty for which orders are subsequently issued is covered by Section 105.270, RSMo Supp. 1984.

Section 41.470, RSMo 1978, authorizes the Governor to order the "organized militia" (defined at Section 41.070, RSMo 1978, to include such elements of the National Guard as are allocated to Missouri) to perform military training and to participate in small arms gunnery competitions. Section 41.480, RSMo 1978, authorizes the Governor to call out the organized militia or any part or individual thereof. Section 41.160.2, RSMo Supp. 1984, charges the Adjutant General with the supervision of all matters pertaining to training of the organized militia of the state.

Section 105.270, RSMo Supp. 1984, refers to "duty or training in the service of this state at the call of the Governor and as ordered by the Adjutant General without regard to length of time". (Emphasis added.) While the word "and" generally refers to the

conjunctive, it can be interpreted as a disjunctive word. Hawkins v. Hawkins, 511 S.W.2d 811 (Mo. 1974). In this instance, it would make little sense to require an order or call from the Governor and an order by the Adjutant General. Such duplication serves no purpose. Accordingly, the above emphasized "and" should be read as "or".

Read in this fashion, subsection 1 of Section 105.270, RSMo Supp. 1984, is triggered in part upon the occurrence of any of three events: (1) The Governor ordering training or gunnery competitions or calling out the organized militia without regard to length of time; or (2) the Adjutant General ordering the individual in question into service or training without regard to length of time; or (3) performance of duty in the service of the United States under competent orders for a period not to exceed a total of fifteen (15) calendar days in any federal fiscal year.

If one of the above-mentioned orders are issued, Section 105.270, RSMo Supp. 1984, is operative, despite the fact that the individual initially volunteered for service. Subsection 2 of Section 105.270, RSMo Supp. 1984, requires the filing of this order with the public employer. Any other construction of the statute would tend to dissuade people from enlisting in the militia and might be a discriminatory practice prohibited by Section 41.730.1, RSMo 1978. See, also, Sections 41.730,3, RSMo 1978, and 105.270.3, RSMo Supp. 1984.

Question No. 2

Your second question asks if a person is entitled to pay under Section 105.270, RSMo Supp. 1984, if such person is also receiving national guard pay. Opinion No. 1, Sheppard, 1959, copy enclosed, concluded that Section 105.270, RSMo 1949 (which is the same as the present statute in all relevant respects, although other changes have occurred), requires that covered employees are to receive their regular salaries while on national guard pay. This opinion answers your second question.

Question No. 3

Your third question asks whether school district employees may or are required to postpone their training exercises with the national guard to summer months when school is not in session.

As previously stated, Section 105.270, RSMo Supp. 1984, is triggered by an appropriate order. If such order postpones

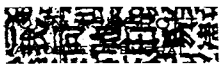
service or training exercises until the summer months, then such service or training is postponed. If such order calls for military service at a time other than the summer months, then such service may not be postponed.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure

WILLIAM L. WEBSTER
ATTORNEY GENERAL

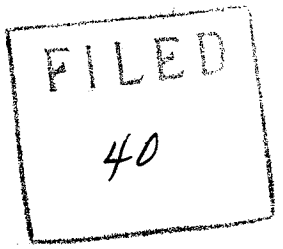


Attorney General of Missouri
POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

DIRECT DIAL: (314) 751-3321

March 11, 1985

OPINION LETTER NO. 40-85



The Honorable Robert J. Seek
Miller County Prosecuting Attorney
Courthouse Annex
Tuscumbia, Missouri 65082

Dear Mr. Seek:

This letter is in response to your questions asking:

1. May the one-fifth portion of the special road and bridge fund collected and paid upon property lying and being within a special road district but not required to be distributed to such special road district under Sections 137.555 and 233.195, RSMo, never-the-less be paid directly to the credit of such district as is the other four-fifths of the fund collected on said property?

   (a) If not, may the county Commission expend the one-fifth retained pursuant to said sections for repair, construction or maintenance of a bridge within such district?

   (b) If so, may more than one-fifth, i.e. a portion of the fund collected on property not within a special road district, be also expended upon a bridge in a special road district?

2. Do the provisions of Sections 234.010 through 234.040, RSMo apply to bridges within a special road district formed in a manner other than under Section 231.010, RSMo and specifically to a special road district formed under the provisions of:
   (a) Sections 233.010 through 233.165, RSMo?
   (b) Sections 233.170 through 233.315, RSMo?

Section 137.555, RSMo 1978, states:

> In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as "The Special Road and Bridge Fund" to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court be used in improving or repairing any street in any

> incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village. [Emphasis added.]

Section 233.195.1, RSMo 1978, states:

> 1. County courts shall cause to be set aside and placed to the credit of each road district so incorporated four-fifths of such part or portion of the tax arising from and collected and paid upon any property lying and being within any such district, by authority of section 137.555, RSMo. All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commissioners thereof for constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district and paying legitimate administrative expenses of the district, and for such other purposes as may be authorized by law.

In Opinion Letter No. 8-84 and Opinion Letter No. 99, Morrison, 1981, copies enclosed, this office considered the above statutes and concluded that counties may not grant the one-fifth portion of its Section 137.555 monies to special road districts. Thus, the answer to the first questions is "no".

The second question presented is whether a county may expend the one-fifth portion of its Section 137.555 monies on bridges in a special road district.

Section 50.550, RSMo 1978, states in part: "The [county] budget shall contain adequate provisions for the expenditures necessary . . . for the repair and upkeep of bridges other than on state highways and not in any special road district, . . .".

In Opinion No. 36, Parish, 1968, copy enclosed, this office concluded that, despite certain language in Section 233.115, RSMo 1959, the predecessor of Section 50.550, RSMo 1978, prohibited the expenditure of county funds on bridges in special road districts. The answer to the second question presented is "no".

The third question asks whether Sections 234.010 to 234.040, RSMo 1978, apply to eight-mile square special road districts,

Sections 233.010 to 233.165, RSMo 1978, or to nontownship county special road districts, Sections 233.170 to 233.315, RSMo 1978 and Supp. 1984.

In Opinion No. 35, Simcoe, 1964, copy enclosed, this office concluded that Sections 234.010 to 234.020, RSMo 1959, did not apply to special road districts that are corporate entities independent of the counties but only to the general county road districts provided for in Section 231.010, RSMo 1959.

Both the eight-mile square and nontownship county special road districts are independent corporate bodies. See Sections 233.025 and 233.170.1, RSMo 1978. Accordingly, Sections 234.010 to 234.040, RSMo 1978, do not apply to eight-mile square or nontownship county special road districts.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosures:

Opinion No. 35, Simcoe, 1964
Opinion No. 36, Parish, 1968
Opinion Letter No. 99, Morrison, 1981
Opinion Letter No. 8, Birch, 1984

EMBRYO TRANSFERS:
MISSOURI VETERINARY MEDICAL BOARD:
VETERINARIAN:
VETERINARY MEDICINE:

Nonsurgical embryo transfers in animals involves acts which constitute the practice of veterinary medicine and requires knowledge of veterinary medicine and such acts may only be performed in Missouri by one who is licensed by the Missouri Veterinary Medical Board under Chapter 340, RSMo 1978 and Supp. 1984, unless such person is exempt from such licensing requirement by Section 340.020, RSMo 1978, or any other applicable exemption from Chapter 340, RSMo 1978 and Supp. 1984.

March 21, 1985

OPINION NO. 41-85

FILED
41

Carl M. Koupal, Jr., Director
Department of Economic Development
Post Office Box 1157
Jefferson City, Missouri 65102

Dear Mr. Koupal:

This opinion is in response to a question posed by the Missouri Veterinary Medical Board on your behalf asking:

> Whether the practice of embryo transfer in animals is the practice of veterinary medicine and therefore falls under the Missouri Veterinary Practice Act, Chapter 340, RSMo.

As we understand it, embryo transfer is the art of removing a fertilized ovum from the reproductive tract of a genetically superior animal (the donor) and the transfer of the ovum to the reproductive tract of an animal usually of the same species and of lesser genetic quality (the surrogate) for gestation and birth. Embryo transfers may be performed on all types of domestic animals, zoo animals, and endangered species, but are primarily performed on cattle, at this time. It is our understanding that the Missouri Veterinary Medical Board is primarily concerned with nonsurgical embryo transfers.[1] Such nonsurgical embryo transfers may include the following steps: (1) the administration of drugs to the donor animal to induce superovulation (the

[1] It is understood that surgical embryo transfers constitute the practice of veterinary medicine.

production of more than one egg in the ovary at one time); (2) the administration of hormones to induce oestrus synchronization between the donor and surrogate animals (this insures that the animals are in heat at the appropriate times); (3) artificial or natural insemination of the donor animal with genetically superior semen, and, hopefully, the formation of embryos; (4) administration of an anesthetic to the donor and surrogate animals prior to the collection procedure; (5) sterilization of various instruments; (6) dialation of the cervixes of the donor and surrogate animals through the use of a cervical dialation rod; (7) insertion of the collection apparatus through the cervix of the donor animal into the uterine horn; (8) palpation of the ovaries; (9) loading of the embryo into a straw in the collection apparatus; (10) the administration of antibiotics to and evaluation of the embryo; (11) the transfer of the embryo to the surrogate animal; and (12) the administration of antibiotics to the surrogate and donor animals.

In part, Section 340.020, RSMo 1978,[2] makes it unlawful for any person not licensed as a veterinarian to practice "veterinary medicine" or to do any act which requires knowledge of "veterinary medicine" for valuable consideration, with certain exceptions not considered here.

Section 340.010(3) states:

> When used in this chapter, the following terms shall mean:
>
> * * *
>
> (3) "Veterinary medicine", the practice of alleviating, rectifying, curing or preventing any injury, disease, deformity, or physical condition of animals, other than human beings and shall include the diagnosing of any affliction, the dispensing or administration of any medicine, appliance, treatment or surgery, or the advising, recommending or prescribing the administration or use of any medicine, appliance, treatment, course or

[2]All statutory references are to RSMo 1978, unless otherwise indicated.

program of treatment, or operation on any such animal.

Section 340.060.3, RSMo Supp. 1984, enumerates the subjects applicants for veterinary licenses must be tested over and includes: (1) anatomy, including histology and embryology; (2) physiology and biochemistry; (3) bacteriology and immunology; (4) pathology and diagnosis; (5) parasitology; (6) medicine, therapeutics, pharmacology; (7) surgery; (8) obstetrics; (9) sanitation, hygiene, meat and milk inspection; (10) standards of professional conduct and ethics; and (11) epidemiology and regulatory veterinary medicine.

Section 340.060.4, RSMo Supp. 1984, requires applicants for veterinary licenses to be subjected to practical examinations, including the handling and restraint of cattle, physical examinations of cattle, diagnosis and treatment of cattle disease, and examinations of cattle for pregnancy.

We believe that subsections 3 and 4 of Section 340.060, RSMo Supp. 1984, enumerate the "knowledge of veterinary medicine" referred to in Section 340.020.

The definition of "veterinary medicine" includes the dispensing or administration of any medicine, appliance, treatment, or surgery or the advising, recommending or prescribing the administration or use of any medicine, appliance, treatment, course or program of treatment, or operation on any animal. Accordingly, we conclude that the performing of nonsurgical embryo transfers in animals constitutes the practice of veterinary medicine and requires knowledge of veterinary medicine. This is in accord with an opinion of the Georgia Attorney General, dated November 29, 1984.

We are aware that the procedure involved in such embryo transfers may take place over an extended period of time and involves some procedures which, if performed independently, may not constitute the practice of veterinary medicine. Clearly, however, the embryo transfer procedure, considered as a whole, does involve practices which may only be performed by licensed veterinarians.

Carl M. Koupal, Jr., Director

Conclusion

It is the opinion of this office that nonsurgical embryo transfers in animals involve acts which constitute the practice of veterinary medicine and requires knowledge of veterinary medicine and such acts may only be performed in Missouri by one who is licensed by the Missouri Veterinary Medical Board under Chapter 340, RSMo 1978 and Supp. 1984, unless such person is exempt from such licensing requirement by Section 340.020, RSMo 1978, or any other applicable exemption from Chapter 340, RSMo 1978 and Supp. 1984.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

March 25, 1985

OPINION LETTER NO. 44-85

FILED
44

The Honorable Sue Shear
Representative, District 87
State Capitol Building, Room 305
Jefferson City, Missouri 65101

Dear Representative Shear:

This letter is in response to your question asking:

> Whether R.S.Mo. §448.2-101.2 requires only that all structural components in buildings and mechanical systems in the common areas of buildings be substantially completed prior to recordation of the condominium declaration.

Section 448.2-101.2, RSMo Supp. 1984, states:

> No declaration or amendment to a declaration adding units to a condominium shall be recorded unless all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by a registered and licensed engineer or architect. [Emphasis added.]

Section 448.4-120, RSMo Supp. 1984, states:

> In the case of a sale of a unit where delivery of an original sale certificate is required, a contract of sale may be executed, but no interest in that unit may be conveyed

> until the declaration is recorded and the unit is substantially completed as evidenced by a recorded certificate of substantial completion executed by a registered and licensed architect or engineer, or by issuance of a certificate of occupancy authorized by law. [Emphasis added.]

Sections 448.2-101.2 and 448.4-120, RSMo Supp. 1984, originated as part of House Committee Substitute for House Bill No. 177, 1983 Mo. Laws 748, 754 and 779. These sections of House Committee Substitute for House Bill No. 177 are derived from the Uniform Condominium Act Sections 2.101(b) and 4.120 (1980), 7 U.L.A. 256-258 and 337-338 (Supp. 1985).

The meaning of the phrase "substantially completed" is discussed at Uniform Condominium Act Section 2-101 comment 7 (1980), 7 U.L.A. 257 (Supp. 1985). Comment 7 defines "substantially completed" as the date the architect (or engineer) certifies that the unit is sufficiently complete to allow the purchaser to occupy or utilize the unit for the use for which it is intended. The comment states that this standard is also often used by building inspectors in issuing certificates of occupancy.

Comment 7 states in part:

> It [the "substantially completed" standard] does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as sticking doors, leaking windows, or some decorative items, might still remain, and the Act contemplates that they need not be completed prior to lawful conveyance.

7 U.L.A. 257 (Supp. 1985). The purpose of the "substantially completed" standard "is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit." Uniform Condominium Act Section 4-120 comment (1980), 7 U.L.A. 338 (Supp. 1985).

Therefore, we conclude that all structural components and mechanical systems of all buildings containing or comprising any units must be substantially completed prior to recordation of the declaration. We further conclude that no individual unit may be conveyed until the declaration is recorded and the unit itself is substantially completed as evidenced by a recorded certificate of substantial completion executed by a registered and licensed architect or engineer, or by an issuance of a certificate of occupancy authorized by law.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

March 25, 1985

OPINION LETTER NO. 46-85

FILED
46

The Honorable John E. Scott
Senator, District 3
State Capitol Building, Room 416
Jefferson City, Missouri 65101

Dear Senator Scott:

This letter is in response to your questions asking:

> What qualifications may the Supreme Court, by rule, require of corporate sureties that are insurance companies licensed to do business in this state? May insurance companies be required to list all bonds issued by a company throughout the United States?

Article V, Section 5, Missouri Constitution, states:

> The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended in whole or in part by a law limited to the purpose. [Emphasis added.]

Pursuant to this constitutional provision, the Supreme Court of Missouri has promulgated Rule 33.17, which establishes the

qualifications of bail bond sureties. In particular, your opinion request refers to subdivision (f) of Rule 33.17, which states:

> A person shall not be accepted as a surety on any bail bond unless:
>
> * * *
>
> (f) He has no outstanding forfeiture or unsatisfied judgment thereon entered upon any bail bond in any court of this state or of the United States.
>
> * * *

We assume for purposes of this opinion that Rule 33.17(f) is procedural in nature.

The General Assembly of the State of Missouri has also established certain requirements for "bail bond agents", "general bail bond agents", "property bail bond agents", and "surety bail bond agents" in Sections 374.700 to 374.775, RSMo Supp. 1984.

Currently, Section 374.760, RSMo Supp. 1984, states:

> Each general bail bond agent shall file, between the first and tenth day of each month, sworn affidavits with the division stating that there are no unsatisfied judgments against him. Such affidavits shall be in the form and manner prescribed by the division.

Because both of these provisions prohibit bail bond sureties from having certain unsatisfied judgments against them, we assume your question asks whether Section 374.760, RSMo Supp. 1984, may be amended to authorize general bail bond agents to have unsatisfied judgments against them and, if such legislation is passed, whether it would be effective as against Rule 33.17(f).

Supreme Court rules that are procedural supercede previously enacted statutes, if there is a direct conflict. Bone v. Adams, 291 S.W.2d 74, 77 (Mo. banc 1956). However, the last sentence of Article V, Section 5, Missouri Constitution, allows the General Assembly to amend a supreme court rule by a law limited to that purpose. Such a law must expressly refer to the rule. State ex rel. K.C. v. Gant, 661 S.W.2d 483, 485 (Mo. banc 1983); State ex rel. Pressner v. Scott, 387 S.W.2d 539, 543 (Mo. banc 1965).

Accordingly, we conclude that the General Assembly may amend or annul a supreme court rule promulgated pursuant to Article V, Section 5, Missouri Constitution, by a law limited to such purpose.

You also ask whether bail bond sureties may be required to list all bonds issued by a company throughout the United States. We conclude that the General Assembly could by legislation or the Supreme Court of Missouri could by rule create such a requirement.

Yours very truly,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

March 21, 1985

OPINION LETTER NO. 47-85

The Honorable Travis Morrison
Representative, District 147
State Capitol Building, Room 114
Jefferson City, Missouri 65101

FILED
47

Dear Representative Morrison:

This letter is in response to your question asking if legislation were passed by the First Regular Session of the Eighty-Third General Assembly of the State of Missouri (the 1985 session) exempting all social security benefit payments from Missouri state income taxation, would such legislation exempt social security benefit payments paid or received prior to the effective date of the bill.

I.R.C. Section 86 makes certain social security and railroad retirement benefits received after December 31, 1983, includible in gross income for federal income tax purposes. Section 143.121.1, RSMo 1978, makes one's Missouri adjusted gross income, his federal adjusted gross income, subject to certain modifications not relevant here. Accordingly, under current Missouri law, certain social security benefit payments are subject to Missouri state income taxation.

In Graham Paper Co. v. Gehner, 332 Mo. 155, 59 S.W.2d 49, 51-52 (banc 1933), the court interpreted Article IV, Section 51, Missouri Constitution (1875) (now, Article III, Section 39(5), Missouri Constitution),[1] as prohibiting the General Assembly from

---

[1]Article III, Section 39(5), Missouri Constitution, states:

> The general assembly shall not have power:
>
> * * *
>
> To release or extinguish or to authorize the releasing or extinguishing, in whole or in part, without consideration, the indebtedness, liability or obligation of any corporation or individual due to this state or any county or municipal corporation.

releasing or extinguishing inchoate tax obligations owed the State of Missouri, and, therefore, the General Assembly may not release or extinguish inchoate tax obligations incurred prior to the effective date of the legislation creating the release, extinguishment or exemption.

We do note, however, that State ex rel. Kolen v. Southwestern Bell Telephone Co., 316 Mo. 1008, 292 S.W. 1037, 1038 (1927) suggests that the General Assembly could exempt from Missouri state income taxation all social security benefit payments paid or received after the effective date of the legislation creating the exemption, and, in addition, the General Assembly could create a deduction (from other income paid or received after the effective date of the legislation) equal to the amount of social security benefits paid or received in the tax year prior to the effective date of the legislation. Assuming the individual in question has sufficient non-social security income paid or received after the effective date of such legislation, the resulting tax treatment is equivalent to a total exemption of social security payments paid or received for the year.

Yours very truly,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 11, 1985

OPINION LETTER NO. 50-85

FILED
50

Carl M. Koupal, Jr., Director
Department of Economic Development
301 West High Street
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This opinion is in response to your question asking:

> For the purposes of calculating the "expenses to be incurred by the Division" under Section 361.170, should the Division of Finance include the fringe benefits attributable to the Division (the state's share of OASDHI, medical insurance contributions, and retirement fund contributions) or should such fringe benefits be considered "other supporting services furnished by the state", the costs of which are recoverable only through the 15 percent surcharge required by that section?

Section 361.170, RSMo 1978, states:

> 1. The expense of every regular and every special examination, together with the expense of administering the banking laws, including salaries, travel expenses, supplies and equipment, shall be paid by the banks and trust companies of the state, and for this purpose the director shall, prior to the beginning of each fiscal year, make an estimate of the expenses to be incurred by the division during such fiscal year. To this, there shall be added an amount equal to fifteen percent of the estimated expenses to

> pay the costs of rent and other supporting services furnished by the state. From this total amount the director shall deduct the estimated amount of the anticipated annual income to the fund from all sources other than bank or trust company assessments. The director shall allocate and assess the remainder to the several banks and trust companies in the state on the basis of their total assets, as reflected in the last preceding report called for by the director under the provisions of section 361.130. A statement of such assessment shall be sent by the director to each bank and trust company on or before July first. One-half of the amount so assessed to each bank or trust company shall be paid by it to the state director of the department of revenue on or before January fifteenth of the next year.
>
> 2. Any expenses incurred or services performed on account of any bank, trust company or other corporation subject to the provisions of this chapter, outside of the normal expense of any annual or special examination, shall be charged to and paid by the corporation for whom they were incurred or performed. [Emphasis added.]

The Division's primary basis for its determination that the state's share of OASDHI, medical insurance contributions, and retirement fund contributions are not part of the "expense of administering the banking laws, including salaries, travel expenses, supplies and equipment, . . ." is grounded on the expressio unius est exclusio alterius rule of statutory construction, i.e., the express mention of one thing implies the exclusion of another. The reasoning is that fringe benefits are not part of an employee's salary, and the express mention of salary in the enumeration of expenses of administering the banking laws implies the exclusion of fringe benefits from consideration as one of these expenses.

We find this reasoning flawed because the expressio unius, etc., canon is not applicable to an enumeration beginning with the word "including". The word "including" is sometimes ambiguous and its meaning may vary according to the context; however, the term is usually one of enlargement rather than of limitation. Kieffer v. Kieffer, 590 S.W.2d 915, 918 (Mo. banc 1979). Construing the term "including salaries" as a part of an illustrative

enumeration of the components of the "expense of administering the banking laws", we find that such term is not one of limitation.

Furthermore, fringe benefits appear to be of the character contemplated by the words "expense of administering the banking laws". Section 105.340, RSMo 1978, requires state employees to make OASDHI contributions. Section 104.366.1, RSMo Supp. 1984, prohibits payroll deductions for contributions to the Missouri State Employees' Retirement System, except for certain employee medical insurance contributions provided for in Section 104.515, RSMo Supp. 1984. Employee contributions for OASDHI and medical insurance are part of the salary paid to the employee and are considered part of the "expense of administering the banking laws". The state's share of OASDHI, medical insurance contributions, and retirement fund contributions are of the same character as are employee contributions for these expenses.

Accordingly, we conclude that the state's contributions for fringe benefits are part of the expense of administering the banking laws under Section 361.170, RSMo 1978.

Yours very truly,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 14, 1985

OPINION LETTER NO. 51-85

FILED
51

The Honorable Harry Wiggins
Senator, District 10
State Captiol Building
Senate Post Office
Jefferson City, Misouri 65101

Dear Senator Wiggins:

You have requested an opinion of this office on the following question:

> To what extent, if any, does the Division of Professional Registration or the Department of Economic Development, have the authority to set salaries, alter the level of salaries, or refuse to process administrative documents necessary to affect levels of salaries of personnel as defined in Section 620.010.16(4) RSMo., Supp. 81, of any of the boards or commissions assigned to the Division of Professional Registration, so long as the board or commission in question has complied with the requirements of Section 620.010.16(5) RSMo., Supp. 81? More specifically, does the Division of Professional Registration or the Department of Economic Development have any authority to take such action or actions based upon compliance of the boards or commissions with the aforementioned statutory provisions?
>
> Additionally, must a job and pay plan relating to the boards and commissions in the Division of Professional Registration be promulgated as a rule pursuant to the provisions of Chapter 536, as well as any modifications to a plan?

Sections 620.010.16(4) and (5), RSMo Supp. 1984 state:

> (4) "Board personnel", as used in this section or chapters 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 345 and 346, RSMo, shall mean personnel whose functions and responsibilities are in areas not related to the clerical duties involving the issuance and renewal of licenses, to the collecting and accounting for moneys, or to financial management relating to issuance and renewal of licenses; specifically included are executive secretaries (or comparable positions), consultants, inspectors, investigators, counsel, and secretarial support staff for these positions; and such other positions as are established and authorized by statute for a particular board or commission. Boards and commissions may employ legal counsel, if authorized by law, and temporary personnel if the board is unable to meet its responsibilities with the employees authorized above. Any board or commission which hires temporary employees shall annually provide the division director and the appropriation committees of the general assembly with a complete list of all persons employed in the previous year, the length of their employment, the amount of their remuneration and a description of their responsibilities.
>
> (5) Board personnel for each board or commission shall be employed by and serve at the pleasure of the board or commission, shall be supervised as the board or commission designates, and shall have their duties and compensation prescribed by the board or commission, within appropriations for that purpose, except that compensation for board personnel shall not exceed that established for comparable positions as determined by the board or commission under the job and pay plan of the department of consumer affairs, regulation and licensing. Nothing herein shall be construed to permit salaries for any board personnel to be lowered except by board action.

As you are aware, the Department of Economic Development, hereafter referred to as "Department", has now assumed the duties of the former Department of Consumer Affairs, Regulation and Licensing. See Article IV, Section 12, Missouri Constitution.

The Honorable Harry Wiggins

Under Section 621.010.16(5), the Department may produce a departmental job and pay plan showing the maximum salaries of "comparable positions" with increments determined by experience and other relevant factors and "the compensation of board personnel shall not exceed that established for comparable positions as determined by the board or commission under the job and pay plan of the department".

The words " as determined by the board or commission" after the words "comparable positions" mean that each board or commission must appropriately determine how the position being budgeted fits into the "comparable positions" in the departmental job and pay plan. Thus, when the boards and commissions budget a position, they should indicate the comparable positions on the departmental job and pay plan. We believe that a reasonable interpretation of this statute permits the Department to reduce budgeted salary increases which exceed the maximum amount of compensation for comparable positions or to modify the budget when, in the view of the department, a board or commission incorrectly determines a "comparable position" within the department job and pay plan.

We note that Section 620.010.16(5) states that nothing herein shall be construed to permit salaries for any board personnel to be lowered except by board action. In our view, this means that the salary of the board personnel may not be lowered below the "current" rate actually being received. However, reading Section 620.010.16(5) as a whole makes it clear that a board cannot increase such a salary level above the increment level established by the pay plan as determined by the Department based on experience or other relevant factors. You have not furnished us with particular facts and, therefore, we do not opine on any particular factual situation. Further, it would not be appropriate for us to do so in the premises.

Your last question asks whether the departmental pay plan has to be promulgated as a rule under Chapter 536, RSMo. A statement which concerns only the internal management of an agency and which does not substantially affect the legal rights of the public or any segment thereof, is not a rule as defined in Section 536.010, RSMo 1978. Therefore, in our view, such job or pay plans are not required to be published as a rule.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 14, 1985

OPINION LETTER NO. 52-85

FILED
52

Lee Roy Black, Ph.D.
Director, Department of Corrections
and Human Resources
2729 Plaza Drive
Jefferson City, Missouri 65101

Dear Mr. Black:

This opinion is in response to your question asking whether a person serving a sentence in the custody of the Division of Adult Institutions who is subsequently charged and convicted on an unrelated offense is to be given jail time credit for time "awaiting trial" on the second offense. We understand that your question does not concern the right to jail time credits for time spent in local facilities, and we do not opine on that issue.

Section 558.031.1, RSMo 1978, states:

> 1. A person convicted of a crime in this state shall receive as credit toward service of a sentence of imprisonment all time spent by him in prison or jail both because awaiting trial for such crime and pending transfer after conviction to the division of corrections or the place of confinement to which he was sentenced. Time required by law to be credited upon some other sentence shall be applied to that sentence alone, except that
>
> (1) Time spent in jail or prison awaiting trial for an offense because of a detainer for such offense shall be credited toward service of a sentence of imprisonment for that offense even though

> the person was confined awaiting trial for some unrelated bailable offense; and
>
> (2) Credit for jail or prison time shall be applied to each sentence if they are concurrent. [Emphasis added.]

The general rule is that a prisoner is not entitled to credit for jail time spent on an offense unrelated to the one for which he is convicted and sentenced. Umphenour v. State, 535 S.W.2d 579, 580 (Mo.App. 1976); State ex rel. Blackwell v. Sanders, 615 S.W.2d 467, 468 (Mo.App. 1981).

The statute in question does not contradict the general rule. It refers to "all time spent . . . in prison . . . because awaiting trial for such crime and pending transfer after conviction . . .". (Emphasis added.) If the individual in question is being incarcerated because of a conviction for an unrelated offense, he is not in prison or jail because he is awaiting trial. He may be awaiting trial, but he is also serving a sentence.

Accordingly, we conclude that a person serving a sentence in the custody of the Division of Adult Institutions who is subsequently charged and convicted on an unrelated offense is not to be credited with jail time while awaiting trial on the second offense under Section 558.031, RSMo 1978.

Very truly yours,

William L Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 1, 1985

OPINION LETTER NO. 53-85

The Honorable James "Jay" Russell
Representative, District 75
House Post Office
State Capitol Building
Jefferson City, Missouri 65102

FILED
53

and

The Honorable Lester Patterson
Representative, District 48
House Post Office
State Capitol Building
Jefferson City, Missouri 65102

Dear Representatives Russell and Patterson:

This letter is in response to your question asking:

> May funds which are collected pursuant to Section 47(a) of Article IV of the Constitution of Missouri be used for the support of parks owned and/or operated by cities, counties, special taxing districts, or other local government entities?

The constitutional provisions to which you refer, effective July 1, 1985, provide as follows:

> Section 47(a). For the purposes of providing additional moneys to be expended and used by the department of natural resources, for the conservation and management of the soil and water resources of this state and the control, management and regulation of the state parks, and for the administration of the laws pertaining thereto, an additional sales tax of one-tenth of one percent is hereby levied and imposed upon all sellers for the privilege of selling tangible personal property or rendering taxable services

> at retail in this state upon the sales and services which now are or hereafter are listed and set forth in, and, except as to the amount of tax, subject to the provisions of and to be collected as provided in the "Sales Tax Law" and subject to the rules and regulations promulgated in connection therewith; and an additional use tax of one-tenth of one percent is levied and imposed for the privilege of storing, using or consuming within this state any article of tangible personal property as set forth and provided in the "Compensating Use Tax Law" and, except as to the amount of the tax, subject to the provisions of and to be collected as provided in the "Compensating Use Tax Law" and subject to the rules and regulations promulgated in connection therewith. [Emphasis added.]
>
> Section 47(b). The moneys arising from the additional sales and use taxes provided for in section 47(a) hereof shall be expended pursuant to appropriation by the General Assembly and used by the department of natural resources for the conservation and management of the soil and water resources of the state and for the control, management and regulation of the state parks, and for the administration of the laws pertaining thereto, and for no other purpose. Fifty percent of the moneys and funds of the department arising from the additional sales and use taxes provided for in 47(a) hereof shall be appropriated for soil and water conservation and fifty percent shall be appropriated for the state parks. [Emphasis added.]

Such sections originated as part of House Joint Resolution No. 21, Eighty-Second General Assembly, Second Regular Session, and were approved by the voters on August 7, 1984. The ballot title to such amendment, which was provided by the Committee on Legislative Research, stated, in pertinent part:

> Levies additional sales tax of one-tenth of one percent, one-half to be used for state park purposes; one-half for soil and water conservation purposes. Expires five years after adoption.

The rules of construction employed by the Missouri courts for statutory interpretation generally apply also to the interpretation of constitutional provisions. Section 1.090, RSMo 1978, provides:

> Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import.

We understand that the point has been raised that Chapter 253, RSMo 1978 and Supp. 1984, applies to "state parks" and that within this chapter there are also provisions relating to subjects such as historic preservation. Accordingly the argument is made that the broad inclusion of other matters in Chapter 253 which do not relate to state parks in the ordinary sense could authorize an interpretation of Sections 47(a) and 47(b) to allow expenditures in support of local government parks. We do not agree. The mere placement of an unrelated provision in a chapter in the Revised Statutes does not, in our view, give such placement any reliable significance with respect to the chapter as a whole. This is particularly obvious with respect to the sections relating to historic preservation, Sections 253.400 to 253.407, RSMo Supp. 1984, which had no such statutory section designation when enacted. See Senate Bill No. 127, Mo. Laws 1979, p. 433. In fact, it has been held that the legislature has no power to give the Constitution an interpretation which would be contrary to its terms. Mobil Oil Corporation v. Danforth, 455 S.W.2d 505, 508 (Mo. banc 1970). Nor do we believe that it could be reasonably concluded that the people voted on a constitutional amendment with the belief that its terms might be qualified by some previously enacted, unrelated statutory provision.

Therefore, it is our view that where such constitutional provisions refer to "the control, management and regulation of the state parks" the plain meaning of the language mandates a construction which would limit it to "state parks" and not include political subdivision's parks.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

March 21, 1985

OPINION LETTER NO. 54-85

FILED
54

The Honorable Doug Harpool
Representative, District 134
State Capitol Building
House Post Office
Jefferson City, Missouri 65102

Dear Representative Harpool:

This letter is in response to your question asking:

> May a school board establish a contract for teachers' services with a salary schedule and ranges for each teacher classification on or before April 15 of each year and may the determination as to the salary within the range be made prior to the performance of services under the contract but after April 15?

The Teacher Tenure Act, Sections 168.102 to 168.130, RSMo 1978 and Supp. 1984, contains the following provisions:

Section 168.106(2), RSMo 1978, provides that "indefinite contracts" (defined at Section 168.104(3), RSMo Supp. 1984, as every contract between a school district and a permanent teacher) continue in effect for an indefinite period, subject to modification by a succeeding indefinite contract or contracts.

Section 168.108, RSMo 1978, provides in part that every indefinite contract contains the following provision:

> "It is further agreed by the parties hereto that this contract shall continue in force from year to year, until modified or terminated in accordance with the provisions of sections 168.102 to 168.130,

> RSMo, and any amendments thereto prior to the date of this contract." [Emphasis added.]

Section 168.110, RSMo 1978, states:

> The board of education of a school district may modify an indefinite contract annually on or before the fifteenth day of April in the following particulars:
>
> (1) Determination of the date of beginning and length of the next school year;
>
> (2) Fixing the amount of annual compensation for the following school year as provided by the salary schedule adopted by the board of education applicable to all teachers.
>
> The modifications shall be effective at the beginning of the next school year. All teachers affected by the modification shall be furnished written copies of the modifications within thirty days after their adoption by the board of education. [Emphasis added.]

In Opinion Letter No. 6-85 this office concluded that the granting of bonuses to teachers for services already contracted for is prohibited by Article VI, Sections 23 and 25, Missouri Constitution. However, if the salary schedule referred to in Section 168.110(2), RSMo 1978, provides for a range of pay such salary schedule is compensation for services provided and is not a grant.

For example, if on or before April fifteenth of a particular year a permanent teacher has an indefinite contract to provide services for the school year beginning in August of a particular year and under the applicable salary schedule such teacher is entitled to ten thousand dollars per annum, the board of education is prohibited from subsequently granting the teacher a bonus for services already contracted for under Article VI, Sections 23 and 25, Missouri Constitution.

However, in answer to your precise question, if on or before April fifteenth of a particular year a permanent teacher has an indefinite contract to provide services for the school year

beginning in August of a particular year and under the applicable salary schedule such teacher is entitled to a range of compensation, e.g., ten thousand to twelve thousand dollars per annum, the board of education may increase the teacher's compensation within the limits of the salary schedule, before services are performed and after April 15 of that year because such is not a grant prohibited by the Constitution of Missouri.

It is also our view that it may be preferable in drafting such a contract to include, if possible, some formula for determining the precise salary figure at a given point of time, based, if necessary, on relevant contingencies.

Yours very truly,

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion Letter No. 6-85

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 28, 1985

OPINION LETTER NO. 60-85

Mr. Carl M. Koupal, Jr.
Director, Department of Economic
Development
Post Office Box 1157
Jefferson City, Missouri 65102

FILED
60

Dear Mr. Koupal:

This letter is in response to your question asking:

> Is the Board of Architects, Engineers and Land Surveyors required under Senate Bill 16, an act passed by the General Assembly duirng the 1981 session, to reimburse the General Revenue Fund for the Board's expenditures during fiscal year 1982 even though the General Assembly appropriated money to the Board for that year from General Revenue?

In your request, you submitted the following statement of facts:

> Senate Bill 16, passed by the General Assembly during the 1981 session, became effective on September 28 of that year. One of the provisions of that measure was to create a fund for the Board of Architects, Engineers and Land Surveyors. All revenues of the Board would be placed in the new fund and expenditures made from it. Prior to the passage of Senate Bill 16, the Board's revenue were deposited to the credit of General Revenue and its appropriations were made from General Revenue.
>
> Although a new fund was created effective September 28, 1981, the Board's appropriations for the fiscal year, beginning

> July 1, 1981, were from General Revenue. This most probably occurred because the appropriations bill and Senate Bill 16 were passed almost simultaneously by the General Assembly. As a result for fiscal year 1982, the Board was forced to operate both under Senate Bill 16, which created a new fund but had no appropriations from it, and House Bill 7, the appropriations bill authorizing expenditures from General Revenue. (Note: all appropriations to the Board after fiscal year 1982 have been from the new fund.)
>
> To resolve the dilemna, the Board, in cooperation with other state agencies decided to reimburse General Revenue for calendar year 1982 expenditures made from the fiscal year 1982 General Revenue appropriation. This date was chosen because the bulk of license fees supporting calendar year 1981 activities were deposited earlier in 1981 to the credit of General Revenue. The amount reimbursed by the Board to General Revenue was $121,389. However, the Board can find no requirement in Senate Bill 16 that any transfer at all be made to General Revenue.

One of the provisions of Senate Bill 16, codified at Section 327.081.1, RSMo Supp. 1984, states:

> All funds received pursuant to the provisions of this chapter shall be deposited in the state treasury to the credit of the "State Board for Architects, Professional Engineers and Land Surveyors Fund" which is hereby established. All expenditures authorized by this chapter shall be paid from funds appropriated to the board by the general assembly from this fund.

It appears that when the General Assembly enacted Section 327.081.1, it made no appropriation to the Board's fund. If the Board had been required to operate totally out of its newly enacted fund, it would have had no operating expenses whatsoever for fiscal year 1982. Therefore, we conclude that the General Assembly enacted House Bill 7 with the apparent intent that the Board would operate from such appropriation until monies could be deposited in the Board's new fund and appropriations made to the Board from that fund.

We further find no provision of law requiring reimbursement from the State Board of Architects, Professional Engineers and Land Surveyors Fund for moneys expended from the General Revenue Fund. Absent such a provision, it is our view that such reimbursement is not required.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

COUNTY COURT:
COUNTY COMMISSION:
CONSTITUTIONAL LAW:

Under Section 49.010, RSMo Supp. 1984, effective January 1, 1985, the "County Court" became known as the "County Commission", and the county "Judges" became known as "Commissioners" of the county. "The Office of the Clerk of the County Court" became known as "The Office of the Clerk of the County Commission".

April 1, 1985

OPINION NO. 61-85

FILED
61

The Honorable Marvin W. Opie
Prosecuting Attorney, Morgan County
Post Office Box 966
Versailles, Missouri 65084

Dear Mr. Opie:

This opinion is in response to your questions asking as follows:

1. Is the Morgan County Court to be known as the "Morgan County Court" or as the "Morgan County Commission"?

2. Are the members of that body to be called "Judges" or "Commissioners"?

3. Is the present presiding judge of the County Court to be known as the "Presiding Judge" or "Presiding Commissioner" until the end of his term?

In Opinion No. 66-1967, this office concluded that inasmuch as the administrative body of the county is designated as the county court in the Missouri Constitution, it would take a constitutional amendment to change its name and that the term "judges of the county court" or "judges" is statutory in origin and, therefore, can be changed by statute. For the reasons stated below we believe that this opinion is incorrect in part and, therefore, is withdrawn.

Article VI, Section 7, Missouri Constitution, provides as follows:

> In each county not framing and adopting its own charter or adopting an alternative form of county government, there shall be elected a county court of three members which shall manage all county business as prescribed by

> law, and keep an accurate record of its proceedings. The voters of any county may reduce the number of members to one or two as provided by law.

Section 49.010, RSMo Supp. 1984, effective January 1, 1985, provides as follows:

> The county court shall be known as "County Commission" and shall be composed of three members, to be styled "Commissioners" of the county, and each county shall be districted by the commissions thereof into two districts, of contiguous territory, as nearly equal in population as practicable, without dividing municipal townships.

Further, Section 49.020, RSMo Supp. 1984, provides for the election and terms of the office of the commissioners. Section 49.050, RSMo Supp. 1984, provides that the clerks of the county commissions shall certify to the Governor the names of the persons elected as county commissioners and that the Governor shall thereupon commission all such persons as commissioners for their respective terms for which they may have been elected. These amendment as well as others which we do not cite here, no doubt, were made to conform to the name styling provisions of Section 49.010.

Our first conclusion in Opinion No. 66-1967 was that the name of the county court could not be changed without a constitutional amendment. This conclusion we believe was in error inasmuch as it is our view that the legislature did have authority to provide, as they did in Section 49.010, that the county court shall be known as the "County Commission". Clearly, the county court has not been abolished; Section 49.010 merely changed the name by which it is to be known. Since the county court still exists, Article VI, Section 7, Missouri Constitution, has not been violated.

In Opinion No. 66-1967, this office also concluded that the title of the judges of the county court could be changed. We believe that conclusion is correct and that Section 49.010 has accomplished that purpose by designating the county court judges as "Commissioners".

Your third question asks whether the presiding judge of the county court is to be known as the "Presiding Judge" or "Presiding Commissioner" until the end of his term. We realize that under

previous Section 49.050, the presiding commissioner was commissioned as a judge. However, it is our view that the legislature did possess the authority to change the title of such office and did effectively do so by providing that the three members of the county commission shall be styled commissioners effective January 1, 1985. It follows that the style changed for all such members as a matter of law on that date.

In addition, we point out that a further question has been raised by some counties which we wish to dispose of here. The question raised is what effect Section 49.010 has on the title of "The Office of the Clerk of the County Court" under Section 51.010, RSMo 1978. It is our view that these statutes have to be read together and, accordingly, on the effective date of Section 49.010 "The Office of the Clerk of the County Court" became known as "The Office of the Clerk of the County Commission". See, also, the sections following Section 49.010 which refer to the clerk of the county commission.

Conclusion

It is the opinion of this office that under Section 49.010, RSMo Supp. 1984, effective January 1, 1985, the "County Court" became known as the "County Commission", and the county "Judges" became known as "Commissioners" of the county. "The Office of the Clerk of the County Court" became known as "The Office of the Clerk of the County Commission".

Yours very truly,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 2, 1985

OPINION LETTER NO. 62-85

FILED
62

Keith Birkes, Esq.
Executive Director
The Missouri Bar
326 Monroe Street
Post Office Box 119
Jefferson City, Missouri 65102

Dear Mr. Birkes:

You have requested, on behalf of the Missouri Bar Association, an opinion as to whether, under Missouri law, funds placed in trust accounts established by attorneys pursuant to amended Missouri Supreme Court Rule 4, DR 9-102 for the benefit of the Missouri Lawyer Trust Account Foundation would qualify under 12 U.S.C. Section 1832(a)(2) for deposit in negotiable order of withdrawal accounts (so-called "NOW accounts" and "Super NOW accounts"). It is the opinion of this office that such funds may be held in these types of accounts.

The question regarding the use of NOW and Super NOW accounts arises because of the Interest On Lawyers Trust Account (IOLTA) program, which was authorized by amended Rule 4, DR 9-102, effective January 1, 1985. Missouri attorneys participating in the IOLTA program deposit clients' funds which are nominal in amount or to be held for a short period of time in an interest-bearing, insured depository account. This would result in the pooling of otherwise unproductive client funds in interest-bearing accounts. All interest earned on such commingled funds would be paid to the Missouri Lawyer Trust Account Foundation (the "Foundation") to be used exclusively for the purposes defined in the Foundation's Articles of Incorporation. Under Article VII of such Articles, the purposes of the Foundation are limited to the following:

(a) providing civil legal assistance to the poor;

(b) improving the administration of justice;

(c) promoting such other programs for the benefit of the public as are specifically approved from time to time by the Missouri Supreme Court for exclusively public purposes.

You have informed us that the Foundation was formed as a non-profit corporation, and that it has requested and expects to receive from the Internal Revenue Service a ruling that it is an organization exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954, as amended. You have further informed us that amended Rule 4, DR 9-102 provides that all accounts ("Accounts") established thereunder must be maintained for the benefit of the Foundation, and that interest earned on the Accounts must be remitted to the Foundation for its exclusive use in carrying out its three specified functions; clients whose funds are deposited in any such account will have no claim or right to any interest earned on such funds -- nor will they have any right to withdraw funds directly from such Account. Only the lawyer or law firm opening such Account may withdraw funds therefrom, and even such lawyer or law firm will not be able to withdraw any earned interest, since amended Rule 4, DR 9-102 specifically requires the lawyer or law firm depositing client funds in the Account to direct the depository institution maintaining such Account to remit all interest thereon to the Foundation, and to transmit with each such remittance a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest paid; a copy of such information is also sent to the lawyer or law firm, but not to any client whose funds were deposited in such Account.

It is recognized that the IOLTA program will be feasible only if interest-bearing NOW and Super NOW accounts are available for the holding of client funds, since such funds must be readily available for withdrawal. NOW and Super NOW Accounts were authorized nationwide by the Consumer Checking Account Equity Act of 1980. Pub. L. No. 96-221, 94 Stat. 145-150. The use of NOW and Super NOW accounts is, however, restricted by the Consumer Checking Account Equity Act. As provided in 12 U.S.C. Section 1832(a)(2), such accounts are permitted "only with respect to deposits or accounts which consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization which is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and which is not operated for profit." (Emphasis added.)

Thus, the question is whether, under Missouri law, NOW and Super NOW accounts used in a manner contemplated by the IOLTA program will

allow the "entire beneficial interest" of such Accounts to be held by the Foundation.

The unique feature of a NOW account when compared to a "traditional" checking account, is the interest that may be earned on deposited funds. (See, S.Rep. No. 96-368, 96th Cong. 2nd Sess. 8 (1979), reprinted in 1980 U.S. Code Cong. & Ad. News 236, 243.) Thus, the underlying purpose of the Consumer Checking Account Equity Act, from the depositor's point of view at least, is to permit the earning of income on funds subject to withdrawal by negotiable instruments. It would appear that in interpreting the restrictions imposed on NOW account eligibility by 12 U.S.C. Section 1832(a)(2) it is appropriate to focus on this single element that primarily differentiates NOW accounts from traditional checking accounts -- the authorization for the payment of interest.

Under the IOLTA program the Foundation clearly holds the sole and entire beneficial right and interest in all of the income that may be earned on IOLTA accounts. Neither the attorneys participating in the program, their clients, nor any other person or entity whatsoever obtains any direct financial benefit from the establishment or maintenance of the Accounts. In our view, the significant and distinct beneficial interest in commingled IOLTA accounts is the right to receive all of the income to be earned on the Accounts -- particularly so where, as here, the commingled IOLTA accounts are only established in the first instance for the specific purpose of transmitting that income to the Foundation for its exclusive use and sole benefit. Conversely stated, whatever other interests in the IOLTA trust funds may be held by someone other than the Foundation would be an interest that is limited to those aspects of a NOW account that are identical to traditional, non-interest-bearing checking accounts, and such person would, thus, derive no benefit whatever from the income-producing feature which differentiates the NOW account from such traditional non-interest-bearing checking account. Accordingly, we believe that the Foundation holds a beneficial interest in such Accounts to the full extent required by 12 U.S.C. Section 1832(a)(2).

We understand that Missouri's IOLTA program established by amended Rule 4, DR 9-102 is very similar to programs already established or proposed in a large number of other states. Numerous other such programs have met the requirements that the recipient foundation or association hold the "entire beneficial interest" of interest-bearing accounts, and programs very similar, if not identical, to the IOLTA program established by Rule 4, DR 9-102 have been approved in numerous other states. Our view of the applicable law is reinforced by an opinion of the Federal Reserve Board's General Counsel that approved, also under 12 U.S.C. Section 1832(a)(2), a like program in Florida. In approving such program,

the Federal Reserve Board's General Counsel wrote as follows on the question of beneficial interest:

> In his opinion concerning the Program, the Florida Attorney General has expressed the view that . . . the Florida Bar Foundation, Inc. has the exclusive right to the interest on the interest on the trust funds maintained under the Florida Program. Since no entity other than the Foundation has any interest to the income derived from funds maintained under the Program, it would appear that, for purposes of 12 U.S.C. § 1832 and 12 C.F.R. § 217.1(e), the Foundation hold(s) the entire beneficial interest to the funds. Accordingly, it is my opinion that funds held under the Florida Bar Foundation's Interest on Trust Accounts Program are eligible to be maintained in NOW accounts at member banks. [Letter from Michael Bradfield, General Counsel, to Donald M. Middlebrooks (October 15, 1981).]

In the absence of Missouri case law or statutes directly on point, it is difficult to add original thoughts or interpretations to those already expressed in other attorneys general opinions. Instead, consistent with such previous opinions and general trust principles, it is our opinion that the trust accounts to be established under Rule 4, DR 9-102 are eligible under 12 U.S.C. Section 1832(a)(2) for placement in NOW and Super NOW accounts.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 14, 1985

OPINION LETTER NO. 63-85

FILED
63

The Honorable Margaret Kelly, CPA
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mrs. Kelly:

This opinion is in response to your questions asking:

1) What is the proper disposition of cash bail bonds, where the accused is charged with the violation of a state traffic penal statute and fails to appear before the court on the date set for trial and he has not signed the appearance, plea of guilty, and waiver on the back of the Uniform Traffic Ticket?

2) What is the proper disposition of cash bail bonds, where the accused is charged with the violation of a state traffic penal statute and fails to appear before the court on the date set for trial and he has signed the appearance, plea of guilty, and waiver on the back of the Uniform Traffic Ticket?

The only difference in your questions is whether the accused has or has not signed the appearance, plea of guilty and waiver.

Missouri Supreme Court Rule 37.485, states:

> (a) Whenever any officer shall arrest a party without a warrant for a misdemeanor involving the operation of a motor vehicle at a time when the magistrate court of the county

> in which the offense occurred is not in session, the sheriff of the county in which the offense was committed may take bail which shall be not less than sixteen dollars nor more than two hundred dollars in accordance with the bail schedule established by the magistrate having jurisdiction over the offense. If the arrested party posts such bail, a recognizance shall be taken for his appearance before the court in which the same is cognizable on the first day the court is next in session to answer the charge stated against him in the Uniform Traffic Ticket, and he shall be released from custody and he may consent in writing to be tried in his absence if he does not appear.
>
> (b) If the person recognized does not appear before the magistrate according to the condition of the recognizance the magistrate shall record the default, but the default may be set aside by the magistrate on the appearance of the person recognized and for good cause shown, at any time to which the examination may be continued by the magistrate. In case the default is not set aside and the party has consented to a trial in his absence, the magistrate may proceed with the trial and render judgment as he may find the facts to be and if the party is adjudged guilty assess such fine against him as is authorized by law. The amount of bail posted shall be declared forfeited, and after payment of court costs, the balance disposed of as a fine assessed in court. [Emphasis added.]

It is our view that this rule covers both of the situations that you present. Therefore, if the party has consented to be tried in absentia a fine may be assessed against him and, if not, the bail may be declared forfeited. In either case, court costs are deducted and the clear proceeds are to be distributed pursuant to Article IX; Section 7, Missouri Constitution, which provides that "[T]he clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the state, . . ., shall be distributed annually to the schools of the several counties according to law." See, also, Section 166.131, RSMo Supp. 1984.

We note that there may be some question with respect to whether or not this rule violates the provisions of Article IX,

Section 7. See, Gross v. Gentry County, 8 S.W.2d 887 (Mo. banc 1928); State ex rel. Rodes v. Warner, 94 S.W. 962 (Mo. 1906). However, the unconstitutionality of such a rule is not clear and, accordingly, we do not believe we should assume the responsibility of declaring such a rule to be invalid. Any question you have in this respect, we believe, should be addressed to the Supreme Court for examination under its continuous rule-making authority.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 14, 1985

ADDENDUM MUST ACCOMPANY THIS OPINION LETTER.

OPINION LETTER NO. 65-85

FILED
65

Larry R. Gale
Director, Missouri Department
of Conservation
2901 North Ten Mile Drive
Jefferson City, Missouri 65101

Dear Mr. Gale:

This letter is in response to your questions asking:

> Whether the Conservation Commission of the State of Missouri has the authority under The Missouri Constitution and statutes to conserve, investigate, and establish programs for endangered and threatened plant species and whether such programs will provide for public participation in the designation of such endangered plant species.

As we understand it, this question concerns whether the Missouri Department of Conservation may enter into a cooperative agreement with the Secretary of the United States Department of the Interior under the Endangered Species Act of 1973, as amended.

16 U.S.C.A. Section 1535(c)(2) (West Supp. 1985) states:

> (2) In furtherance of the purposes of this chapter, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty

days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this chapter. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this chapter, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program --

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened;

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or

that under the State program --

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary of the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs; except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 1533(d) of section 1538(a)(1) of this title with respect to the taking of any resident endangered or threatened species.

16 U.S.C.A. Section 1532 (West Supp. 1985) states in part:

For the purposes of this chapter --

* * *

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

* * *

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of

this chapter would present an overwhelming overriding risk to man.

* * *

(14) The term "plant" means, any member of the plant kingdom, including seeds, roots and other parts thereof.

* * *

(16) The term "species" includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

(17) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) the term "State agency" means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

* * *

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

* * *

See, also, 50 C.F.R. Section 81.

I.

Whether the Conservation Commission of the State of Missouri has the Authority under the Missouri Constitution and Statutes to Conserve Endangered and Threatened Plant Species.

16 U.S.C.A. Section 1535(c)(2)(A) (West Supp. 1985) requires the state agency to have authority to conserve resident species of endangered or threatened plants.

Missouri Constitution, Article IV, Section 40(a) states:

> The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, by and with the advice and consent of the senate, not more than two of whom shall be of the same political party. The members shall have knowledge of and interest in wildlife conservation. The members shall hold office for terms of six years beginning on the first day of July of consecutive odd years. Two of the terms shall be concurrent; one shall begin two years before and one two years after the concurrent terms. If the governor fails to fill a vacancy within thirty days, the remaining members shall fill the vacancy for the unexpired term. The members shall receive no salary or other compensation for their services as members, but shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties.

Missouri Constitution, Article IV, Section 47, states:

> The department of natural resources shall be in charge of a director appointed by the governor, by and with the advice and consent of the senate. The department shall administer the programs of the state as provided by law relating to environmental control and the conservation and management of natural resources.

Section 252.240.2, RSMo Supp. 1984, states:

> 2. The exportation, transportation or sale of any endangered species of plant, or parts thereof, or the sale of or possession with intent to sell any product made in whole or in part from any parts of any endangered species of plants is prohibited, unless authorized by regulation. For purposes of this section, "endangered species of plants" shall mean those species of plants which are designated as rare or endangered by the department of conservation or listed in the "United States List of Endangered and Threatened Wildlife and Plants" pursuant to the Endangered Species Act of 1973, Public Law 93-205 (87 STAT 884) as amended, or listed in the "Appendices on the Convention of International Trade in Endangered Species of Wild Fauna and Flora." [Emphasis in original.]
>
> * * *
>
> 5. The collecting, digging, or picking of any rare or endangered plant without permission of the property owner is prohibited.

Your opinion request indicates that the only species of plants with a range containing at least part of Missouri that has been designated as rare or threatened by the Missouri Department of Conservation, 3 CSR 10-4.111, or listed in the United States List of Endangered and Threatened Wildlife and Plants, 50 C.F.R. Section 17.12, or listed in the Appendices in the Convention of International Trade in Endangered Species of Wild Fauna and Flora, 50 C.F.R. Section 23.23, is the small whorled pogonia, which was designated as endangered and placed on the United States List of Endangered and Threatened Wildlife and Plants on September 10, 1982, 47 F.R. 38927.

We view your first question to have two parts: (A) Whether endangered and threatened plant species are a form of "wildlife" under the Missouri Constitution, Article IV, Section 40(a), or whether such are "natural resources" under Missouri Constitution, Article IV, Section 47, and (B) whether the department of the State of Missouri that has jurisdiction over the conservation of endangered and threatened plant species has sufficient powers to qualify as a "state agency" with the power to "conserve" endangered and threatened plant species, as those terms are defined under 16 U.S.C.A. Section 1532(3) and (18) (West Supp. 1985).

Larry R. Gale

A.

Whether Endangered and Threatened Plant Species are a Form of "Wildlife" Under the Missouri Constitution, Article IV, Section 40(a), or Whether Such are "Natural Resources" Under Missouri Constitution, Article IV, Section 47.

The Missouri Department of Conservation has been delegated the power to control, manage, restore, conserve, and regulate all wildlife resources in Missouri. Missouri Constitution, Article IV, Section 40(a). The Missouri Department of Natural Resources has been delegated the power to conserve and manage natural resources. Missouri Constitution, Article IV, Section 47. We have found no Missouri authorities on whether endangered and threatened plant species are a form of "wildlife" or a "natural resource".

The rules applicable to the construction of statutes are applicable to the construction of constitutional provisions; the latter are given a broader construction due to their more permanent character. Boone County Court v. State, 631 S.W.2d 321, 325 (Mo. banc 1982). The words used in constitutional provisions are interpreted so as to give effect to their plain, ordinary and natural meaning. Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. banc 1982). The plain, ordinary and natural meaning of a word is that meaning commonly understood by the People when they adopted the constitutional provision; the commonly understood meaning is derived from the dictionary. Buechner v. Bond, 650 S.W.2d 611, 613 (Mo. banc 1983).

The American Heritage Dictionary of the English Language (1981 Houghton Mifflin Company) defines the word "wildlife" as follows: "Wild animals and vegetation; especially, animals living in a natural, undomesticated state." (Emphasis added.) M. Bean, The Evolution of National Wildlife Law 3 n.5 (Report to the Council on Environmental Quality, written on behalf of the Environmental Law Institute 1977) indicates that the term "wildlife" has expanded over time and may now include plants.

In Section 252.020(3), RSMo 1978, the General Assembly defined the term "wildlife" for purposes of the Wildlife and Forestry Law to include only animals. While the legislative definition of a constitutional term is given deference, State ex rel. O'Connor v. Riedel, 329 Mo. 616, 46 S.W.2d 131, 134 (banc 1932), we note that the definition of the term "wildlife" in Section 252.020(3), RSMo 1978, is for the purpose of Chapter 252, RSMo, the Wildlife and Forestry Law, and that the General Assembly cannot change the definition of a constitutional term by statute, Mobil Oil Corporation v. Danforth, 455 S.W.2d 505, 507-508 (Mo. banc 1970). More

persuasive is the fact that an examination of Section 10 of the Omnibus State Reorganization Act of 1974, App. B, RSMo 1978, shows that the Department of Natural Resources deals principally, if not exclusively, with inanimate objects, such as water, air, land reclamation, etc. The Department of Conservation, on the other hand, has long acted to conserve the forestry resources of Missouri, a type of plant resource. Missouri Constitution, Article IV, Section 40(a); Chapter 254, RSMo 1978 and Supp. 1984. Accordingly, we conclude that endangered or threatened plant species are a form of "wildlife" under Missouri Constitution, Article IV, Section 40(a).

B.

Whether the Department of the State of Missouri that has Jurisdiction Over the Conservation of Endangered and Threatened Plant Species has Sufficient Powers to Qualify as a "State Agency" With the Power to "Conserve" Endangered and Threatened Plant Species, as Those Terms are Defined Under 16 U.S.C.A. Section 1532(3) and (18) (West Supp. 1985).

16 U.S.C.A. Section 1532(3) (West Supp. 1985) defines the term "conserve" very broadly. The specific methods and procedures enumerated as part of the power to conserve include scientific resources management, such as scientific research, census taking, law enforcement, habitat acquisition and maintenance, propagation, transplantation, and regulated taking.

Missouri Constitution, Article IV, Section 40(a) gives the power to control, manage, restore, and conserve forestry and wildlife resources to the Conservation Commission. We believe these powers impliedly authorize the Conservation Commission to conduct scientific resources management activities, such as scientific research, census taking, propagation, transplantation, and regulated taking. Land or habitat acquisition and maintenance for forestry and wildlife conservation is authorized under Missouri Constitution, Article IV, Section 41. See, also, Missouri Constitution, Article IV, Sections 43(a) and (b).

Conservation agents also have some statutory law enforcement powers. For example, see Section 252.085, RSMo Supp. 1984. Thus, the Missouri Department of Conservation has certain law enforcement powers over endangered and rare plants.

Accordingly, we conclude that the Missouri Conservation Commission has the authority to "conserve" endangered and threatened

plant species, as that term is defined in 16 U.S.C.A. Section 1532 (3) (West Supp. 1985).

II.

Whether the Missouri Department of Conservation has the Authority Under the Missouri Constitution and Statutes to Investigate Endangered and Threatened Plant Species.

16 U.S.C.A. Section 1535(c)(2)(C) (West Supp. 1985) requires that the state agency be authorized to conduct investigations to determine the status and requirements for survival of resident species of plants. The term "investigate" is not defined in the federal law; however, we infer that a scientific, not a criminal, investigation is intended. We conclude that the power to conduct scientific investigations of rare or endangered plants is subsumed with the Conservation Commission's constitutional powers to control, manage, restore, and conserve forestry and wildlife resources in Missouri.

As there presently is no statutory authority for conservation agents or other employees of the Missouri Department of Conservation to enter upon private land for the purpose of investigating the status and requirements of endangered or threatened plant species, such investigations may be conducted upon private property only with the consent of the property owner(s). Cf. Section 254.250(2), RSMo 1978; Missouri Attorney General Opinion No. 46, James, 1970.

III.

Whether the Missouri Department of Conservation has the Authority Under the Missouri Constitution and Statutes to Establish Programs for Endangered and Threatened Plant Species.

16 U.S.C.A. Section 1535(c)(2)(B) (West Supp. 1985) requires the state agency to establish acceptable conservation programs for all resident species of endangered or threatened plants.

We believe the power to establish such programs is subsumed within the Conservation Commission's constitutional power to control, manage, restore, conserve, and regulate forestry and wildlife resources of Missouri.

IV.

Whether Such Programs Will Provide for Public Participation in the Designation of Such Endangered Plant Species.

The Missouri Department of Conservation will designate rare or endangered plant species by administrative rule. Section 252.240, RSMo Supp. 1984. Under Section 536.021, RSMo 1978, administrative rules are promulgated under a notice and order form of rule making. The notices of proposed rule making are specifically required to have a provision stating the place at which a statement in support of or opposition to the proposed rule may be filed within a specified time. Section 536.021.2(5), RSMo 1978. Hearings on proposed administrative rules may be held. Section 536.021.2(6), RSMo 1978. We believe that these provisions of Missouri's Administrative Procedure Act allow public participation in the designation of endangered and threatened plant species for purposes of 16 U.S.C.A. 1535(c)(2)(D) (West Supp. 1985).

It is, therefore, our view that the Missouri Department of Conservation has the authority to conserve, investigate and establish programs for endangered and threatened plant species, and Missouri's Administrative Procedure Act allows for public participation in the designation of resident endangered or threatened plant species by the Missouri Department of Conservation.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

December 27, 1985

ADDENDUM TO OPINION
LETTER NO. 65-85

FILED
65

Larry R. Gale, Director
Missouri Department of Conservation
Post Office Box 180
Jefferson City, Missouri 65102-0180

Dear Mr. Gale:

This addendum to the above-captioned opinion letter is in response to your question asking whether the provision of § 252.240.2, RSMo Supp. 1984, providing for the commercial use of endangered plant species by regulation of the Missouri Conservation Commission of the State of Missouri, is void under 16 U.S.C. § 1535(f) and the Supremacy Clause of the United States Constitution.

Section 252.240.2, RSMo Supp. 1984, provides in part:

> 2. The exportation, transportation, or sale of any endangered species of plant, or parts thereof, or the sale of or possession with intent to sell any product made in whole or part from any parts of endangered species of plants is prohibited, unless authorized by regulation. ....

(Emphasis added.) Presently, the Missouri Conservation Commission has not promulgated any regulations under this statutory provision.

16 U.S.C. § 1535(f) provides:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the

> extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less than the prohibitions so defined.

(Emphasis added.)

The terms "endangered species" and "threatened species" that appear in the first sentence of 16 U.S.C. § 1535(f) are defined in 16 U.S.C. § 1532(6) and (20), respectively, as certain "species". The term "species" is defined in 16 U.S.C. § 1532(16) to include "plants", as defined in 16 U.S.C. § 1532(14). Thus, the first sentence of 16 U.S.C. § 1535(f) has application to endangered or threatened plant species. The second sentence of 16 U.S.C. § 1535(f) exempting the sale of certain "fish or wildlife" from preemption does not have reference to plants. See 16 U.S.C. § 1532(8) (defining the term "fish or wildlife").

U.S. Const. art. VI, cl. 2, provides

> This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; ....

In H. J. Justin & Sons, Inc. v. Brown, 519 F. Supp. 1383, 1385 (E.D., Calif. 1981), affirmed in part and reversed in part on other grounds, 702 F.2d 758 (9th Cir. 1983), cert. denied, 464 U.S. 823 (1983), the court stated:

> The basic principles of the preemption doctrine are too well-settled to require citation: while the states are not prohibited from legislating and regulating in those areas where the states and Congress

> have concurrent jurisdiction, by virtue of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, the authority of the states to legislate in an area of concurrent jurisdiction is always at the sufferance of Congress. In those areas where Congress has indeed exercised its jurisdiction, it may allow for the continued operation of state legislation and regulation, or may abrogate state law entirely. Therefore, whether a particular federal enactment preempts state is always purely a question of Congressional intent.

In this instance, Congress has explicitly expressed its intent with regard to premption under the Endangered Species Act of 1973, as amended (hereinafter sometimes referred to as the "Act"). By its terms, 16 U.S.C. § 1535(f) preempts any state law or regulation with respect to the importation or exportation of or interstate or foreign commerce in endangered or threatened species which permit what the Act or regulations prohibit or which prohibit what the Act or regulations permit. Thus, the precise scope of the preemption may only be determined by reference to the Act and the regulations adopted to implement the Act. Man Hing Ivory and Imports, Inc. v. Deukmejian, 702 F.2d 760, 763 (9th Cir. 1983).

16 U.S.C. § 1538(2), inter alia, prohibits the importation, exportation, delivery, receiving, carrying, or transporting in interstate or foreign commerce, or the selling or offering to sell in interstate or foreign commerce any endangered or threatened plant species.

50 C.F.R. § 17.61 (1984), as amended by 50 F.R. 39687, 39690 (September 30, 1985), states, inter alia, that except as otherwise provided 50 C.F.R. §§ 17.62 or 17.63, it is unlawful to import or export, deliver, receive, carry, transport, or ship in interstate or foreign commerce, or to sell or to offer to sell in interstate commerce any endangered plant. 50 C.F.R. §§ 17.62 and 17.63 (1984), as amended by 50 F.R. 39687, 39690 (September 30, 1985), provide for exemptions from the rule stated above upon application for permit for scientific purposes and to prevent undue economic hardship, respectively. 50 C.F.R. § 17.71 (1984), as amended by 50 F.R. 39687, 39691 (September 30, 1985), states that except as otherwise provided, the provisions of 50 C.F.R. § 17.61 apply to threatened plants as well as endangered ones. 50 C.F.R. § 17.72 (1984), as amended by 50 F.R. 39687, 39691 (September 30, 1985), allows the Director to issue permits to authorize otherwise prohibited activities with regard to threatened plants for scientific purposes, the enhancement of the propagation or survival of threatened species, economic hardship, botantical or horticultural exhibition, education purposes, or

other activities consistent with the purposes and policies of the Act.

Thus, it can be seen that federal law generally prohibits the exportation or sale of "endangered species of plants", as defined in § 252.240.2, RSMo Supp. 1984, with certain exceptions. Section 252.240.2, RSMo Supp. 1084, also prohibits the exportation or sale of endangered species plants, unless authorized by regulation. As the Missouri Conservation Commission has not issued regulations authorizing the sale or export of endangered plants by federal permittees, Missouri law is presently more restrictive than the federal law. 16 U.S.C. § 1535(f) authorizes states to have regulations that are more restrictive than those in federal law regarding the "taking" of endangered or threatened plant species. The term "taking" is defined in 16 U.S.C. § 1532(19) as "to harrass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Because the term "taking" does not include the exportation, importation, transportation, or selling of plants, Congress has not allowed the States to be more restrictive than federal law with regard to these latter matters, and Missouri cannot prohibit a federal permittee from exporting, transporting, or selling endangered plants. See Man Hing Ivory and Imports, Inc. v. Deukmejian, 702 F.2d 760, 764 (9th Cir. 1983) (California cannot prohibit federal permittees from permitted trade in elephant products in California).

On the other hand, the clear language of 16 U.S.C. § 1535(f) prohibits Missouri from permitting by regulation what is prohibited by the Act and its implementing regulations. Thus, any regulations promulgated under § 252.240.2, RSMo Supp. 1984, cannot be less restrictive than federal law in this regard.

Accordingly, we conclude that § 252.240.2, RSMo Supp. 1984, and any regulations promulgated thereunder are preempted by 16 U.S.C. § 1535(f) and U.S. Const. art. VI, cl. 2, to the extent these state laws permit what the Act and its regulations prohibit or prohibit what the Act and its regulations permit. The Missouri Conservation Commission may want to consider promulgating a short regulation under § 252.240.2, RSMo Supp. 1984, that is coextensive with or incorporates the relevant provisions of the Act and its regulations.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

TAXATION:
MERCHANTS' AND MANUFACTURERS'
REPLACEMENT TAX:

The "preceding year" referred to in Section 139.600.1, RSMo Supp. 1984, is a calendar year.

July 11, 1985

OPINION NO. 66-85

FILED
66

The Honorable Margaret Kelly, CPA
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mrs. Kelly:

This opinion is in response to your request for a review of certain instructions styled "Calculation of Rate of Additional Countywide Tax on Subclass 3 Property to Replace Revenues Lost Because of Exemption of Merchants' and Manufacturers' Inventory". We have examined this document and find that the principal issue presented is whether the term "preceding year" in Section 139.600.1, RSMo Supp. 1984, refers to a year beginning on January 1, 1984, and ending December 31, 1984, or a year beginning April 1, 1984, and ending March 31, 1985.

On August 3, 1982, the People of the State of Missouri adopted House Committee Substitute for Senate Joint Resolution No. 25, 1982 Mo. Laws 741, known as Amendment No. 7 on the ballot. In part, Amendment No. 7 amended Article X, Section 6, Missouri Constitution. Subsection 1 of Article X, Section 6, Missouri Constitution, now exempts certain personal property (inventories) from taxation; such exemption is effective on January 1 of the year in which the county completes its first general reassessment. Most counties will complete their first general reassessment during 1985. See, Sections 137.750 and 139.600.1, RSMo Supp. 1984. Subsection 2 of Article X, Section 6, Missouri Constitution, states in part:

> 2. All revenues lost because of the exemption of certain personal property of manufacturers, refiners, distributors, wholesalers, and retail merchants and establishments shall be replaced to each taxing authority within a county from a countywide tax hereby imposed on all property in subclass 3 of class 1 in each county. For the year in which the exemption becomes effective, the county clerk shall calculate the total revenue lost by all taxing authorities in the county and

> extend upon all property in subclass 3 of class 1 within the county, a tax at the rate necessary to produce that amount. . . .

Subsection 4 of Article X, Section 6, Missouri Constitution, defines the terms "revenues lost" and "lost revenues" with reference to the "revenue which each taxing authority received from the imposition of a tangible personal property tax on all personal property held as industrial inventories, . . . in the last full tax year immediately preceding the effective date of the exemption from taxation granted for such property under subsection 1 of this section, and which was no longer received after such exemption became effective." (Emphasis added.)

Section 137.074.2, RSMo Supp. 1984, requires certain taxing officials to separately identify the property that falls within the exemption referred to above in the 1984 tax year and thereafter until the exemption becomes effective.

Section 139.600.1, RSMo Supp. 1984, states:

> To implement the provisions of section 6 of article X of the Missouri Constitution, the amount received by each taxing authority for the preceding year which will be "lost revenues" as defined in subsection 4 of section 6 of article X of the Missouri Constitution and resulting from the exemption of certain personal property of manufacturers, refiners, distributors, wholesalers, and retail merchants and establishments, shall be determined by each county clerk as of March thirty-first of the year the exemption becomes effective and shall include any delinquent taxes received during the preceding year and taxes for the preceding year which have been received by the collector but are subject to an appeal as of that date. The levy to be charged against the assessed valuation of real property listed in subclass (3) of class 1 of section 4(b) of article X of the Missouri Constitution necessary to produce the total revenues lost by all taxing authorities in the county shall be determined by each county clerk no later than September first of the year the replacement tax is first imposed. The exemption of certain personal property of manufacturers, refiners, distributors, wholesalers, and

> retail merchants and establishments under section 6 of article X of the Missouri Constitution shall not become effective in any county or city not within a county of this state until January 1, 1985, upon which date such exemption shall be effective in all counties and cities not within a county in this state.

Section 1.020, RSMo Supp. 1984, states:

> As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:
>
> * * *
>
> (9) "Month" and "year". "Month" means a calendar month, and "year" means a calendar year unless otherwise expressed, and is equivalent to the words "year of our Lord"; [Emphasis added in part.]

Unless otherwise expressed or otherwise specially provided or unless plainly repugnant to the intent of the legislature, the term "year" refers to a calendar year.

Although it could be argued that using an April 1, 1984 to March 31, 1985 "preceding year" would result in the best calculation of the actual 1984 lost revenues (because this would count 1984 delinquencies received in the first three months of 1985 as 1984 revenue), we do not believe that the General Assembly has specially provided for a year other than a calendar year in Section 139.600.1, RSMo Supp. 1984. Thus, the "preceding year" referred to in Section 139.600.1, RSMo Supp. 1984, is a calendar year. In addition, it is our view that the statute implements Subsection 4 of Article X, Section 6, Missouri Constitution, and that the statutory reference to "preceding year" has the same meaning as "last full tax year". C.f. State ex rel. Randolph County v. Walden, 206 S.W.2d 979 (Mo. banc 1947).

CONCLUSION

It is the opinion of this office that the "preceding year" referred to in Section 139.600.1, RSMo Supp. 1984, is a calendar year.

Yours very truly,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 23, 1985

OPINION LETTER No. 67-85

The Honorable Irene Treppler
Senator, District 1
State Capitol Building, Room 424
Jefferson City, Missouri 65101

and

The Honorable Frank Bild
Senator, District 15
State Capitol Building, Room 331A
Jefferson City, Missouri 65101

FILED
67

Dear Senators Treppler and Bild:

This letter is in response to your request for an opinion of this office asking as follows:

> Will the Missouri Court of Appeals, Eastern District, decision, State ex rel. Ciaramitaro vs. Charlack, 679 S.W.2d 405 (Mo. App. 1984), that a mayor in a fourth class city may break a tie vote on the Board of Alderman have an affect on sections 79.120, 79.230 and 79.320, RSMo 1978?
>
> On a six member board, will the mayor be able to break a tie vote on his/her appointments under section 79.230, RSMo 1978?

The sections to which you refer[1] provide as follows:

[1]All statutory references are to RSMo 1978, unless otherwise indicated.

> 79.120. The mayor shall have a seat in and preside over the board of aldermen, but shall not vote on any question except in case of a tie, nor shall he preside or vote in cases when he is an interested party. He shall exercise a general supervision over all the officers and affairs of the city, and shall take care that the ordinances of the city, and the state laws relating to such city, are complied with.
>
> 79.230. The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, and the person elected marshal may be appointed to and hold the office of street commissioner.
>
> 79.320. The board of aldermen shall elect a clerk for such board, to be known as "the city clerk", whose duties and term of office shall be fixed by ordinance. Among other things, the city clerk shall keep a journal of the proceedings of the board of aldermen. He shall safely and properly keep all the records and papers belonging to the city which may be entrusted to his care; he shall be the general accountant of the city; he is hereby empowered to administer official oaths and oaths to persons certifying to demands or claims against the city.

In the Charlack case, which you cite, the Missouri Court of Appeals, Eastern District, concluded that the mayor of a fourth class city was not precluded from casting a tie-breaking vote on the question of the removal of a city's police chief, even though

under Section 79.240, RSMo 1978, the removal of the appointed chief of police was to be by the "mayor . . . with the consent of a majority of all the members elected to the board of aldermen. . . ." The court in that case also concluded that the mayor was not precluded from casting the tie-breaking vote on the grounds that he "is an interested party" as provided in Section 79.120 since there was "[n]o allegation or evidence . . . present[ed] indicating that the mayor's action results from deep personal enmity for respondent or that the mayor wishes to appoint a family member or close personal friend as chief of police. Nor has there been any indication that the mayor has a financial stake in the removal of respondent." 679 S.W.2d at 408.

We note that the Charlack case was ultimately denied transfer to the Missouri Supreme Court. We further note that we are in disagreement with the conclusion reached by the Court. However, since there is no other Missouri appellate case on the precise subject or on the related questions that you pose, we are required to accept the interpretation of the court and to apply the reasoning of the court's holding to such other statutes as may be applicable.

When the opinion of the court became final, this office withdrew the following opinions: Opinion No. 72, dated April 21, 1939, to Pulley, which held that a mayor of a city of the third class cannot vote to break a tie vote of a council on a question of confirmation of his appointee; Opinion No. 37, dated May 4, 1943, to Harned, which held that a mayor of a city of the third class cannot vote to break the tie vote of a council on a question of confirmation of his appointee; and Opinion Letter No. 201-1977, which concluded that the mayor of a fourth class city has no authority to vote in case of a tie with respect to the removal of an appointed city officer which was sought by the mayor.

Therefore, in direct answer to your question, the Charlack case compels the conclusion that unless there is clear evidence of a personal interest of the type indicated in Charlack, the mayor will have the right to break a tie vote on mayoral appointments made under Section 79.230. Charlack, however, does not affect our prior views with respect to the "election" of the city clerk by the board of aldermen under Section 79.320. That section appears to be separate and distinct from Section 79.230 respecting the appointment power of the mayor with the consent and approval of the majority of the board of aldermen. Section 79.320 provides that the board of aldermen shall elect a clerk. We have previously concluded, and we believe correctly so, that

the mayor does have a right to break a tie vote on the question of the election of the city clerk when the mayor is not an interested party and the motion to appoint, as is appropriate under Section 79.320, is made and seconded by aldermen. Opinion Letter No. 102-1981.

Finally, it is our view that the Charlack holding is questionable. Therefore, it is our recommendation that the better practice would be for the mayor not to vote to break a tie under Sections 79.230 or 79.240.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 14, 1985

OPINION LETTER NO. 73-85

FILED
73

Bill Smith, Superintendent
Oregon County R-IV School District
Alton, Missouri 65606

Dear Mr. Smith:

This letter is issued to you pursuant to Section 610.027.5, RSMo Supp. 1984, on behalf of the Oregon County R-IV School District, in response to a question asking:

> Are the enrollment cards, census cards, and health cards of students, copies of which are attached, both front and back, and incorporated herein by reference, "public records" as defined in Chapter 610.010-.030 of the Revised Statutes of Missouri, 1979, as amended, (the so-called "Sunshine Law") so that the information recorded thereon by Oregon County R-IV School District is open for inspection and/or copying by the public in general and the Missouri NEA in particular?

As we understand the situation, the Oregon County R-IV School District has received a request from Bob LeMon, a representative of the Missouri National Educational Association for a:

> Complete list of all names and addresses of parents with children in school. If no list exist[s], I will copy whatever card or file you have available.

The enrollment card in question contains blanks for the student's grade, name, birthdate, date of enrollment, school last attended, parent or guardian, parents' or guardian's address, the parents' or guardian's home and business phone numbers, who to contact in case of emergency, doctor's name, and a listing of the student's subjects and teachers.

The census card in question contains blanks for the child's name, the father's name, the mother's name, address, telephone number, bus driver, birthdate, place of birth, sex, race, age on September 1, and certain other blanks for remarks.

The health card in question contains blanks for the student's name, phone number, address, sex, race, birthdate, parents' names, parents' employers, name of school, family physician, family dentist, eye specialist, grade, age, height, weight, vision testing, hearing testing, dental examination, scoliosis screening, blood pressure, eyes, ears, nose, throat, neck, lungs, thorax, heart, abdomen, feet, skin, histories for accidents, allergies, chicken pox, convulsions, ear infections, rubella, hepatitis, measles, mumps, operations, pneumonia, poliomyelitis, rheumatic fever, strep. throats, tuberculosis, whooping cough, and histories for the following immunizations: DTP, DTP-Booster, DT, DT-Booster, Td, Td-Booster, Polio-Type, Polio-Booster, Measles, Mumps, Rubella, MR, MMR, and Tuberculin test.

Section 610.015, RSMo 1978, states: "Except as provided in section 610.025, and except as otherwise provided by law, . . . public records shall be open to the public for inspection and duplication."

Section 610.010(4), RSMo Supp. 1984, states:

> As used in sections 610.010 to 610.030 and 610.100 to 610.115, unless the context otherwise indicates, the following terms mean:
>
> * * *
>
> (4) "Public record", any record retained by or of any public governmental body including any report, survey, memorandum, or other document or study prepared and presented to the public governmental body by a consultant or other professional service paid for in whole or in part by public funds; provided, however, that personally identifiable student records maintained by public educational institutions shall be open for inspection by the parents, guardian or other custodian of students under the age of eighteen years and by the parents, guardian or other custodian and the student if the student is over the age of eighteen years; [Emphasis added.]

Bill Smith, Superintendent

Section 610.025.4 and .5, RSMo Supp. 1984, state:

> 4. Other meetings, records or votes as otherwise provided by law may be a closed meeting, closed record, or closed vote.
>
> 5. Before any meeting, record, or vote may be a closed meeting, closed record, or closed vote, the governmental body shall vote on the question of making the meeting, record, or vote closed and such question shall receive an affirmative, public vote of a majority of the quorum of the body. The vote of each member on the question of holding the closed meeting, record, or vote and the reason for holding the closed meeting, record or vote by reference to a specific reason under the provisions of this section shall be announced publicly at an open session and entered into the minutes. Notice of the closed meeting, record, or vote shall also be given as provided in section 610.020. A closed meeting, record, or vote shall be held only to the extent a closed meeting, record, or vote is necessary for the specific reason announced and the governmental body shall not discuss any business during a closed meeting, record, or vote which does not directly relate to the specific reason announced as justification for the closed meeting, record, or vote.

The "student records proviso" italicized above appears to have been enacted in response to the Federal Family Educational Rights and Privacy Act, as amended, 20 U.S.C. Section 1232g (1976 and Supp. V 1981). With certain exceptions, this federal statute cuts off the flow of federal funds to schools that have a policy or practice of releasing personally identifiable information other than directory information contained in students' educational records without the parents' or student's consent. Directory information may only be released after giving public notice of the categories of information that is deemed directory and allowing a reasonable period of time after such notice for a parent to inform the institute or agency not to release such without the parent's prior consent. The Sunshine Law contains no such consent or notice provisions.

34 C.F.R. Section 99.3 (1984) defines the term "personally identifiable" as "(a) the name of the student, the student's parent, or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security

number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable."

The term "directory information" is defined in 20 U.S.C. Section 1232g(a)(5)(A) (1976 and Supp. V 1981), as "the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student." 34 C.F.R. Section 99.3 (1984) defines the term "directory information" in the same manner, except it adds the words "and other similar information" to the list. The "other similar information" proviso appears to include the names and addresses of the student's parents.

As the apparent purpose of the "student records proviso" in the Sunshine Law is to implement the Federal Family Educational Rights and Privacy Act, as amended, we do not believe that the General Assembly intended to extend the confidentiality of student records beyond that required by the federal act. Accordingly, we conclude that the term "personally identifiable student records" in Section 610.010(4), RSMo Supp. 1984, does not include "directory information" as that term is defined in 20 U.S.C. Section 1232g(a)(5)(A) (1976 and Supp. V 1981) and 34 C.F.R. Section 99.3 (1984). Student directory information is a "public record" within the definition found in Section 610.010(4), RSMo Supp. 1984.

There are two "unless otherwise provided by law" provisos in the Sunshine Law: one in Section 610.015, RSMo 1978, and one in Section 610.025.4, RSMo Supp. 1984. The Section 610.015, RSMo 1978 "otherwise provided by law" proviso applies when the closure of the record is mandated by the other law; the Section 610.025.4, RSMo Supp. 1984 "otherwise provided by law" proviso applies when the closure of the record is discretionary with the public governmental body. See, Opinion Letter No. 119-84.

Once a school district elects to accept federal funds tied to the Federal Family Educational Rights and Privacy Act, as amended, the federal procedures are obligatory. 20 U.S.C. Section 1232g(a)(5)(B) (1976 and Supp. V 1981) allows the release of directory information only after the giving of public notice of the categories of information deemed directory and a reasonable time for parental objection to the release of the types of information described without the parent's consent. Accordingly, a school district may release directory information only upon compliance with the federal act; the "otherwise provided by law" proviso of Section 610.015, RSMo 1978, requires the closure of

such directory information until such procedures are complied with, if the school district accepts federal moneys tied to the Federal Family Educational Rights and Privacy Act, as amended.

If the school district does not receive federal moneys tied to the Federal Family Educational Rights and Privacy Act, as amended, then there is no law to otherwise provide for directory student information, and such information may be released as a public record without compliance with the federal procedures.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 28, 1985

OPINION LETTER NO. 74-85

FILED
74

Mr. Scott S. Sifferman
Prosecuting Attorney
Lawrence County Courthouse
Post Office Box 69
Mt. Vernon, Missouri 65712

Dear Mr. Sifferman:

This letter is written in response to your question which reads as follows:

> May the Lawrence County Commission legally agree to refrain from increasing the assessed valuation and property taxes on a parcel of real estate of an individual for a period of five years after improvements are added to the parcel of real estate?

As we understand the facts involved, an individual has proposed building a number of condominiums in Lawrence County, Missouri. In conjunction with this construction, the individual has asked the Lawrence County Commissioners to give him an assurance that they will not increase the assessed valuation of the "common areas" of the real estate once they have been improved with the street, sewers and other improvements. The individual has requested that the valuation remain at the level of unimproved property for a period of five years after the improvements have been placed on the property. The property itself does not fall under any charitable, religious or other exception, including the exemption available for redevelopment of a blighted area.

Real property tax is imposed in this state annually based upon an assessment by the county assessor related to the value of the property. See Section 137.115, RSMo Supp. 1984. In

accordance with the Missouri Constitution, the tax imposed must be uniform upon each class of property and the assessment of property in each class must be fixed at its value or such percentage of its value as authorized by law. Article X, Sections 3 and 4(b) of the Missouri Constitution, as amended. Article X, Section 2 of the Missouri Constitution states that the power to tax shall not be surrendered, suspended or contracted away, except as authorized by the Constitution.

Nothing in the Missouri Constitution or laws permits the Lawrence County Commission to refrain from increasing the assessed valuation on certain areas of a condominium development for five years after improvements have been added to the real property. In the absence of an express exemption, the county assessor is obligated to assess this property each year based upon its value, taking into account any improvements which have enhanced the value.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

May 14, 1985

OPINION LETTER NO. 76-85

FOR OPINION 76

The Honorable Wesley A. Miller
Representative, District 108
House Post Office
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative Miller:

This letter is in response to your request for an opinion of this office asking as follows:

1. Does a public water district organized under Chapter 247 have to comply with the Hancock Amendment in increasing monthly water rates?

2. Assuming a public water district has issued bonds, what, if any, limits are placed on the water district in raising monthly rates under the Hancock Amendment?

The answer to your first question, we believe, essentially depends upon whether or not the charges constitute taxes, licenses or fees within the meaning of Article X, Section 22(a) of the Missouri Constitution. If they are such, the case of Roberts v. McNary, 636 S.W.2d 332 (Mo. banc 1982) applies and increases in such charges must be approved by the voters under Hancock. If such charges are contractual in nature, it is doubtful that they would be subject to such a vote. See our Opinion No. 122-1982, copy enclosed. And, see Pace v. City of Hannibal, 680 S.W.2d 944 (Mo. banc) at l.c. 948, in which the Court stated that payments which were not imposed by statute, charter or ordinance, but represented voluntary payments by the city board of public works into the city's general revenue fund did not come within Hancock. We are of the view that there is a reasonable probability that

a court would hold that water district rates are of a contractual nature and, therefore, that Hancock does not apply.

If the public water supply district has issued revenue bonds, the Missouri Supreme Court holding in the case of Oswald v. City of Blue Springs, 635 S.W.2d 332 (Mo. banc 1982) is authority for the raising of the rates, without voter approval, to pay principal and interest on revenue bonds issued for the purpose of construction of the facilities and to meet costs of maintenance and operation of a plant. In this respect, the Court stated at l.c. 334:

> Lastly, and most persuasively, logic demands the conclusion that the voters, by authorizing the Mayor and Board of Aldermen to increase rates to repay principal and interest, also authorized concomitant increases to pay for the costs of maintenance and operation. It cannot be argued seriously that a majority of the voters of the City approved the issuance of 19.1 million dollars of revenue bonds and authorized the City to increase the rates charged to users to repay the principal and interest on the bonds, yet did not authorize effectually an increase in those rates to keep the physical plant maintained and in working order. The promise to repay the bonded indebtedness would be illusory without the promise to keep the facilities running. . . .

We trust this answers your questions.

Yours very truly,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion No. 122, Leffler, 1982

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 22, 1985

OPINION LETTER NO. 77-85

FILED
77

Dr. Arthur L. Mallory
Commissioner of Education
State Board of Education
P. O. Box 480
Jefferson City, Missouri 65102

Dear Dr. Mallory:

At your request, we have reviewed the Department's Fiscal Year 1986 Application for Federal Assistance under Title I of the Elementary and Secondary Education Act of 1965, as amended by the Education Consolidation and Improvement Act of 1981, for the provision of educational services to educationally deprived children of migratory agricultural workers and fishermen.

We have considered relevant provisions of the Elementary and Secondary Education Act of 1965, as amended, including the regulations thereunder, as well as Art. III, § 38(a), Mo. Const. (1945), and § 161.092, RSMo 1978.

This letter constitutes our official certification that the Missouri Department of Elementary and Secondary Education has the authority under state law to perform the duties and functions of a "State educational agency" as defined in Title I of P.L. 89-10, as amended (20 U.S.C. § 244(7)), including those arising from the assurances set forth in the application.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

April 25, 1985

OPINION LETTER NO. 79-85

FILED
79

The Honorable Dennis Smith
Senator, District 30
1010 West Sunshine
Springfield, Missouri 65807

Dear Senator Smith:

This letter is in response to your question asking the meaning of the word "resident" in Sections 115.607.1 and 115.617, RSMo Supp. 1984.

At the outset we note that the word "resident" has been defined on many occasions by case law. Section 1.020, V.A.M.S., annotations 179 and 180, summarize numerous cases dealing with the term residence and intention to be a resident.

In State ex rel. King v. Walsh, 484 S.W.2d, 641 (Mo. banc 1972), the Court construed the word "resident" and looked to the intent of the party claiming residency. Such intent can be borne out by physical presence or even if there is a lack of physical presence by such manifestations of intent as location of living quarters, membership in a local church, maintenance of an account in a local bank, voter registration, returning to the location where the residence is claimed during holiday periods, and even obtaining a hunting license in such location. While these items may not totally be in point with the factual considerations you may be faced with, the establishment of one's residence is largely a matter of intention. Intention must be considered in light of physical acts performed in conformity with the intent to establish the fact of residency.

I am enclosing copies of Attorney General Opinion Letter No. 152-1975 and Opinion No. 168-1969. Both are instructive with regard to your question. In the 1969 opinion, John C. Danforth, who was then Attorney General, stated that he was unable to give an opinion on whether a certain commissioner was a legal resident

of Cass County because it depended on many factors that had not been determined or made known to the Attorney General at that time. That opinion expresses our views with regard to the question of residency.

Finally, we do not believe that we are in a position to adjudicate whether the facts in a particular case give rise to abondonment of one's residence for the purposes of Sections 115.607 or 115.617. As was the situation in the 1969 opinion, there may be facts which will evidence residency or nonresidency. We are unable to offer an opinion as to the residency of a particular committee person because there are many factors which are unknown to us. Further, this office does not determine facts in the opinion process. Nor may we perform a judicial function. Gershman Investment Corp. v. Danforth, 517 S.W.2d 33 (Mo. banc 1974).

We trust this answers your questions.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosures:

Opinion Letter 152-1975
Opinion No. 168-1969

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

November 5, 1985

OPINION LETTER NO. 80-85

Mr. Carl M. Koupal, Jr., Director
Department of Economic Development
Truman State Office Building
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This letter is in response to your question asking:

> Does the Director of the Department of Economic Development have the authority to enter into a contract with a company to recover abandoned or unclaimed funds on the state's behalf?
>
> If the Director of the Department of Economic Development has the authority to enter into such a contract, can the company be compensated from proceeds recovered?

The Uniform Disposition of Unclaimed Property Act, Sections 447.500 to 447.585, RSMo Supp. 1984, was adopted in House Bill No. 1088, 1984 Mo. Laws 702.

Section 447.572, RSMo Supp. 1984, authorizes the Director to delegate any duty imposed upon him by the Uniform Disposition of Unclaimed Property Act "to such division officers or other agency employees as he deems appropriate." Section 447.583, RSMo Supp. 1984, authorizes reciprocal agreements with other states with respect to information relating to abandoned property and the collection of abandoned property. However, in the premises, no express or implied authority appears to exist for contracting with independent contractors to collect unclaimed property. Cf., Section 140.850, RSMo Supp. 1984, relating to out of state delinquent tax collections for the director of the Department of Revenue.

The situation is similar to that found in Thatcher v. City of St. Louis, 343 Mo. 597, 122 S.W.2d 915 (1938). Therein the court found that the Attorney General had the authority to employ special assistants with limited or special authority, see State on inf. McKittrick ex rel. Handlan v. Wilkie Land Co., 165 S.W.2d 432, 434 (Mo.App., St. L. 1942), but that there was nothing authorizing such special assistants to be paid from the proceeds of the litigation. We find nothing allowing private collection agencies to be compensated from the proceeds of the unclaimed property collected.

It is therefore the opinion of this office that the Director may not enter into an independent contractor relationship with a "company" for the purpose of collecting unclaimed property; the Director may hire special employees who are delegated collection functions under Section 447.572, RSMo Supp. 1984; these special employees may not be compensated from the proceeds of the funds collected.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

OPTOMETRISTS:
PHARMACISTS:
CONTROLLED SUBSTANCES:
DRUGS:
DEPARTMENT OF ECONOMIC DEVELOPMENT:

An optometrist certified pursuant to Section 336.220, RSMo Supp. 1984, to administer topically applied diagnostic pharmaceutical agents may also prescribe such diagnostic pharmaceutical agents, except controlled substances. Pharmacists licensed under Chapter 338, RSMo, may dispense drugs according to such prescriptions.

November 14, 1985

OPINION NO. 81-85

Carl M. Koupal, Director
Department of Economic Development
Truman State Office Building, Sixth Floor
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This opinion is in response to your question:

> Is a prescription executed by a licensed optometrist, pursuant to section 336.220 RSMo (Supp. 1981) Missouri Board of Optometry, recognized as valid for dispensing purposes by a licensed pharmacist within a licensed pharmacy in the State of Missouri.

No provision of Missouri law prohibits the dispensing of drugs, which are generally referred to as prescription drugs, except controlled substances, without a prescription. However, federal law does prohibit the dispensing of certain types of drugs unless they have been prescribed by a practitioner licensed to adminster this type of drug. 21 U.S.C. § 353(b)(1) provides:

> (b)(1) A drug intended for use by man which --
>
> (A) is a habit-forming drug to which section 352(d) of this title applies; or
>
> (B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner

> licensed by law to administer such drug; or
>
> (C) is limited by an approved application under section 355 of this title to use under the professional supervision of a practitioner licensed by law to administer such drug,
>
> shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which reults in the drug being misbranded while held for sale.

This statute allows a practitioner to write a prescription for a prescription drug if the practitioner is "licensed by law to administer such drug." Whether or not a practitioner is licensed to administer prescription drugs must be determined by state law. Winograd v. Johnson, 561 P.2d 1274 (Colo. Ct. App. 1976). Section 336.220, RSMo Supp. 1984, authorizes the use of topically applied diagnostic pharmaceutical agents by an optometrist in the practice of optometry if the optometrist has been certified by the State Board of Optometry to use diagnostic pharmaceutical agents. We understand that the types of drugs which are diagnostic pharmaceutical agents include drugs for which a prescription is required under 21 U.S.C. § 353(b)(1).

Section 336.220, RSMo Supp. 1984, authorizes the "use" of diagnostic pharmaceutical agents in subsections 1 and 2. In subsections 3, 4 and 5, the term "administer" is used instead of the term "use." In fact, the specific language in Section 336.220.4, RSMo Supp. 1984, states:

> Any provision of section 336.010 to the contrary notwithstanding, a registered optometrist who is examined and so certified by the state board of optometry may administer topically applied diagnostic pharmaceutical agents in the practice of optometry.

Therefore, since a D.P.A. (diagnostic pharmaceutical agent) certified optometrist may administer these types of drugs, a D.P.A. certified optometrist may, under the federal law, write a prescription for these drugs unless some other provision of Missouri law provides to the contrary.

Section 195.070, RSMo 1978, contains specific provisions with regard to who may prescribe controlled substances. It states in pertinent part:

> 1. A physician, podiatrist or a dentist, in good faith and in the course of his professional practice only, may prescribe, administer, and dispense controlled substances or he may cause the same to be administered by a nurse or intern under his direction and supervision.
>
> 2. A veterinarian, in good faith and in the course of his professional practice only, and not for use by a human being, may prescribe, administer, and dispense controlled substances and he may cause them to be administered by an assistant or orderly under his direction and supervision.

Additionally, Section 195.060, RSMo 1978, provides in part that, with certain exceptions not relevant to this question, a pharmacist may dispense controlled substances only upon the prescription of a physician, dentist, podiatrist or veterinarian. The term "physician" includes only those persons licensed by the State Board of Registration for the Healing Arts under Chapter 334, RSMo. Section 334.021, RSMo 1978. Since the provisions of Chapter 195 appear to be in conflict with Section 336.220, we must apply the rules of statutory construction. Where two statutes conflict and cannot be harmonized, if one statute is specific and the other is general, the specific statute prevails. Bartley v. Special School District of St. Louis County, 649 S.W.2d 864, 867 (Mo. banc 1983). In this instance, the specific language of Chapter 195 prevails over the general language of Section 336.220. Therefore, if an optometrist's prescription written pursuant to Section 336.220 involves a controlled substance, a pharmacist may not dispense the controlled substance pursuant to that prescription.

We find no other provision of Missouri law which prohibits an optometrist from prescribing drugs. We conclude, therefore, that by authorizing D.P.A. certified optometrists to administer certain prescription drugs, the legislature intended to authorize such optometrists to prescribe such prescription drugs other than controlled substances.

Carl M. Koupal, Director

Conclusion

It is the opinion of this office that an optometrist certified pursuant to Section 336.220, RSMo Supp. 1984, to administer topically applied diagnostic pharmaceutical agents may also prescribe such diagnostic pharmaceutical agents, except controlled substances. Pharmacists licensed under Chapter 338, RSMo, may dispense drugs according to such prescriptions.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

July 11, 1985

OPINION LETTER NO. 82-85

FILED
82

The Honorable Margaret Kelly, CPA
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mrs. Kelly:

This opinion letter is in response to your questions asking:

1) If a political subdivision, other than a school district, uses the attached forms and related instructions in calculating its permissible property tax rates for 1985, will the rates so calculated comply with Missouri law?

2) If the answer to question 1 above is no, what revisions in the forms and related instructions are necessary so the rates calculated will comply with Missouri law?

We have reviewed your Proposed Rule 15 CSR 40-3.050 entitled, "Revision of Property Tax Rates By Political Subdivisions Other Than School Districts". We believe that Proposed Rule 15 CSR 40-3.050(2)(B)2, Schedule 1A, and Exhibit A are in error, because such indicate that only locally assessed property should be included in the "property base" under Section 137.073.2, RSMo. Since the submission of your opinion request, the Governor approved Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session. Section 137.073.2 of the new law specifically includes state-assessed property in the "property base". Accordingly, the references to locally assessed

property in Schedule 1A, Exhibit A, and Proposed Rule 15 CSR 40-3.050(2)(B)2 should be revised to reflect the new law.

Our review has not uncovered any other changes that need to be made in the proposed instructions submitted.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

July 11, 1985

OPINION LETTER NO. 84-85

FILED
84

The Honorable Margaret Kelly, CPA
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Mrs. Kelly:

This opinion letter is in response to your questions asking:

1) If a school district uses the attached forms and related instructions in calculating its permissible property tax rates for 1985, will the rates so calculated comply with Missouri law?

2) If the answer to question 1 above is no, what revisions in the forms and related instructions are necessary so the rates calculated will comply with Missouri law?

We have reviewed your Proposed Rule 15 CSR 40-3.040 entitled, "Revision of Property Tax Rates by School Districts". We believe that Proposed Rule 15 CSR 40-3.040(3)(B)1 and Schedule 1B are in error, because such indicate that only locally assessed property should be included in the "property base" under Article X, Section 22(a), Missouri Constitution, and Section 137.073.5, RSMo. Since the submission of your opinion request, the Governor approved Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session. Section 137.073.5 of the new law implements the Hancock Amendment tax rate rollback by defining the term "property" to include state assessed property. Accordingly, the references to locally assessed property in

The Honorable Margaret Kelly, CPA

Proposed Rule 15 CSR 40-3.040(3)(B)1 and Schedule 1B should be revised to reflect the new law.

Our review has not uncovered any other changes that need to be made to the proposed instructions submitted.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

June 24, 1985

OPINION LETTER NO. 85-85

FILED
85

Mr. Larry R. Gale
Director, Missouri Department
of Conservation
2901 North Ten Mile Drive
Jefferson City, Missouri 65101

Dear Mr. Gale:

This letter is in response to your request for an opinion of this office asking whether employees that the Missouri Department of Conservation classify as "term" or "temporary" employees are members of the Missouri State Employees' Retirement System.

You also state:

> The Missouri Department of Conservation presently has three classes of employees and they are defined as follows: A) Permanent. An appointment authorized in a budget with Commission approval. B) Term. An appointment authorized and approved by the Director for a specific period, such as for a project or contract. Fringe benefits and classification procedures shall be identical to those authorized for permanent employees. Salaries, including cost-of-living increases, will be reviewed annually on the date of employment. C) Temporary. An appointment approved by the Division Chief, Staff Officer or Unit Head for up to one fiscal year. Employee may be reappointed if funding and needs have been justified.

Section 104.310(21)(a), RSMo Supp. 1984, with respect to the definition of "employee" provides in pertinent part:

> Any elective or appointive officer or employee of the state who is employed by a

> department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand hours per year, . . .

It is our view that if the department classifies an employee as a "term" employee or a "temporary" employee because the position does not normally require the actual performance by the employee of duties during one thousand hours per year or more, such an employee does not meet the statutory requirement. It is also our view, however, that the status of the employee in this respect should not be solely dependent on the departmental classification. That is, if the department has classified an employee as a "term" or "temporary" employee on the basis of limited hours of work and later determines that the employee's hours, based on a one-year period exceed the statutory minimum, the employee, if otherwise qualified and within such definition, should be retroactively reclassified as an employee for the purposes of the Missouri State Employees' Retirement System.

Yours very truly,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

July 11, 1985

OPINION LETTER NO. 88-85

FILED
88

The Honorable David L. Rauch
Representative, District 121
1405 Main Street
Higginsville, Missouri 64037

Dear Representative Rauch:

This letter is in response to your question asking:

> In the definition of "tax revenues" contained in subdivision (5) of subsection 1 of section 137.073, RSMo, does the phrase "the actual receipts from ad valorem levies on all classes of property" include receipts from ad valorem levies on property assessed by the state or is it limited to receipts from ad valorem levies on property which is assessed locally?

Recently, the Governor approved Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session. Section 137.073.1(5) of the new bill specifically includes state assessed property in the definition of the term "tax revenues". Thus, the tax revenues referred to include receipts from both state and locally assessed property.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

June 27, 1985

OPINION LETTER NO. 95-85

FILED
95

The Honorable Tom McCarthy
Senator, District 26
State Capitol Building, Room 427
Jefferson City, Missouri 65101

Dear Senator McCarthy:

This letter opinion is in response to your question asking:

(A) Does a Central Emergency Dispatching Center funded by a three cent tax collected by a number of Fire Districts and controlled by a board made up of elected officials of each participating fire district:

(1) Need to obey the state sunshine laws?

(2) Need to observe all state laws governing fire districts?

(B) Is a joint central fire and emergency dispatching service, as provided by sections 321.243 and 321.245 RSMo, 1978, as amended, which is funded by general tax revenues raised through such member fire protection districts, and independent political subdivision of the State of Missouri?

It is our understanding that a number of fire protection districts and municipalities in Saint Louis County, Missouri, have entered into a cooperative agreement under Article VI, Section 16, Missouri Constitution, and Sections 70.210 to 70.320, RSMo 1978, to form the Central County Emergency Dispatching Service ("Service"). The Service is funded with the three-cent levy provided for in

Section 321.243, RSMo Supp. 1984, and is controlled by a joint board created under Section 70.260, RSMo 1978.

Section 70.230, RSMo 1978, provides the method of execution of such a cooperative agreement as follows:

> Any municipality may exercise the power referred to in section 70.220 by ordinance duly enacted, or, if a county, then by order of the county court duly made and entered, or if other political subdivision, then by resolution of its governing body or officers made and entered in its journal or minutes of proceedings, which shall provide the terms agreed upon by the contracting parties to such contract or cooperative action.

The municipalities that are parties to the cooperative agreement have executed the agreement by ordinance. The fire protection districts that are parties to the agreement have executed the agreement by resolution.

I.

Applicability of the Sunshine Law

Section 610.015, RSMo 1978, states:

> Except as provided in section 610.025, and except as otherwise provided by law, all public votes shall be recorded, and if a roll call is taken, as to attribute each "yea" and "nay" vote, or abstinence if not voting, to the name of the individual member of the public governmental body, and all public meetings shall be open to the public and public votes and public records shall be open to the public for inspection and duplication.

The definitions of the terms "public meeting", "public record", and "public vote" in Section 610.010(3), (4) and (5), RSMo Supp. 1984, refer to the term "public governmental body", defined in Section 610.010(2), RSMo Supp. 1984, which states:

> (2) "Public governmental body", any legislative or administrative governmental entity created by the constitution or

> statutes of this state, by order or ordinance of any political subdivision or district, or by executive order, including any body, agency, board, bureau, council, commission, committee, department, or division of the state, of any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rule-making or quasi-judicial power, any committee appointed by or under the direction or authority of any of the above named entities and which is authorized to report to any of the above named entities, and any quasi-public governmental body. The term "quasi-public governmental body" means any corporation organized or authorized to do business in this state under the provisions of chapter 352, 353, or 355, RSMo, which performs a public function, and which has as its primary purpose to enter into contracts with public governmental bodies, or engage primarily in activities carried out pursuant to an agreement or agreements with public governmental bodies; except urban redevelopment corporations organized or authorized to do business under the provisions of chapter 353, RSMo, which are privately owned, operated for profit, and do not expend public funds;

Thus, the Sunshine Law applies to certain meetings, records, and votes of public governmental bodies. The definition of the term "public governmental body" is limited to legislative or administrative governmental entities created by (1) the Missouri Constitution, (2) Missouri statute, (3) order of a Missouri political subdivision, (4) ordinance of a Missouri political subdivision or by (5) executive order. Administrative entities created by cooperative agreements authorized by statute which are executed in part by resolution and in part by ordinance are not expressly included in this definition.

A similar situation was faced in Cohen v. Poelker, 520 S.W.2d 50 (Mo. banc 1975). In Cohen the court determined that the Board of Estimate and Apportionment of the City of Saint Louis (a board created by city charter) was subject to the Sunshine Law. The

reasoning of the court was that the General Assembly intended to prohibit secrecy in the conduct of governmental business at all levels of government through enactment of the Sunshine Law; accordingly, a strict application of the definition of the term "public governmental body" is not to be applied. We believe that the joint board governing the Central County Emergency Dispatching Service is the type of deliberative governmental body subject to the Sunshine Law; such joint board is a "public governmental body" under the Sunshine Law.

II.

Applicability of Fire Protection District Laws

We do not believe that we can answer the question of whether the Central Emergency Dispatching Service must comply with all state laws governing fire protection districts. This question can only be answered with respect to specific laws.

III.

Is a Joint Central Fire and Emergency Dispatching Service an Independent Political Subdivision?

In Opinion No. 38, 1979, copy enclosed, this office concluded that joint boards created by cooperative agreement under Section 70.260, RSMo, may, depending upon the cooperative agreement, come within the definition of "instrumentality" for social security reporting services. The definition of the term "instrumentality", as found in Section 105.300(7), RSMo, required the instrumentality to be a juristic entity that is legally separate and distinct from the political subdivision(s). However, the definition of the term "political subdivision" usually connotes a governmental entity with the power to levy taxes. See, Kansas City Area Transportation Authority v. Ashley, 478 S.W.2d 323, 324 (Mo. 1972), transferred, 485 S.W.2d 641 (Mo.App. 1972). Under Section 321.243, RSMo Supp. 1984, it is the city, town, village, or fire protection district that is a party to the cooperative agreement that levies the tax, not the joint board created under Section 70.260, RSMo 1978.

Accordingly, we conclude that joint boards created by cooperative agreement under Section 70.260, RSMo 1978, may, if the cooperative agreement so provides, be separate and distinct juristic entities; however, because such joint boards do not generally have the power to levy taxes, they are not separate and distinct political subdivisions in the normal sense.

Very truly yours,

William Webster

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion No. 38, Bradford, 1979

AIR CONSERVATION COMMISSION:
DEPARTMENT OF PUBLIC SAFETY:
AIR POLLUTION:

The gasoline inlet restrictor on motor vehicles is an air pollution control device.

July 3, 1985

OPINION NO. 98-85

FILED
98

Richard C. Rice, Director
Missouri Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65102

Dear Mr. Rice:

This opinion is in response to your request which asks the following question:

> Is the gasoline inlet restrictor on motor vehicles an air pollution control device?

Based upon the additional information in your request, your question relates to the Motor Vehicle Safety Inspection under Sections 307.350 to 307.400, RSMo, and particularly to Section 307.360.1, RSMo Supp. 1984, which provides:

> The superintendent of the Missouri state highway patrol shall issue permits and written instructions to official inspection stations and shall furnish forms and certificates for the inspection of brakes, lighting equipment, signaling devices, steering mechanisms, horns, mirrors, windshield wipers, tires, wheels, exhaust system[sic], glazing, air pollution control devices, fuel tank, and any other safety equipment required by the state. In no instance will road testing of a vehicle be considered a part of the inspection procedure. [Emphasis added.]

No definition of an air pollution control device appears in this statute. Without a statutorily prescribed definition, the general rule is that the words in question are to be given their plain and ordinary meaning. State ex rel. C. C. G. Management Corp. v. City of Overland, 624 S.W.2d 50, 53 (Mo.App., E.D. 1981). Clearly, the plain and ordinary meaning of the term "air pollution

control device" would include any device, the primary purpose of which is to reduce or prevent the release of pollutants into the air.

The foregoing definition of an air pollution control device includes the gasoline inlet restrictor. For the purposes of this opinion, the following factual statements are assumed to be true:

1. The burning of leaded gasoline in motor vehicles creates more pollutants than the burning of "lead free" gasoline in motor vehicles.

2. The objectives of a gasoline inlet restrictor are to allow the use of "lead-free" gasoline in motor vehicles and to prevent the use of leaded gasoline in motor vehicles.

Based upon these assumptions, a gasoline inlet restrictor is an air pollution control device, since the inlet restrictor prevents the use of a type of fuel which creates more pollutants. This position is also supported by federal law.

The purpose of the Clean Air Act is to initiate a program to prevent and control air pollution. See, 42 U.S.C. Section 7401. Pursuant to that purpose, federal law prohibits manufacturers and dealers of motor vehicles and persons who repair or service motor vehicles from removing or rendering inoperative a gasoline inlet restrictor which is required to be on new motor vehicles. See, 42 U.S.C. Section 7522, and 40 C.F.R. Section 80.24(b). Thus, it is apparent from the federal requirements that a gasoline inlet restrictor is an air pollution control device which serves the purpose of the Clean Air Act.

CONCLUSION

It is the opinion of this office that a gasoline inlet restrictor on motor vehicles is an air pollution control device.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Dan Pritchard.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

September 6, 1985

OPINION LETTER NO. 100-85

The Honorable Doug Harpool
Representative, District 134
House Post Office
State Capitol Building
Jefferson City, Missouri 65101

100
FILED

Dear Representative Harpool:

This letter is in response to your question asking as follows:

> Absent a waiver of the competitive bid requirements of Chapter 34 by the Commissioner of Administration, and/or delegation of authority provided for in Chapter 34 by the Commissioner of Administration, may the Department of Mental Health of the State of Missouri directly purchase community mental health services and/or community placement services for "patients, residents or clients" without competitive bidding?

We enclose a copy of our Opinion No. 7-85 which answers your question in part.

Your question primarily concerns the relationship between Section 630.405, RSMo Supp. 1984, and Section 34.100, RSMo Supp. 1984.

Section 630.405.3 provides:

> 3. The commissioner of administration, in consultation with the director [of the Department of Mental Health], shall promulgate rules establishing procedures consistent with the usual state purchasing procedures under chapter 34, RSMo, for the purchase of

> services under this section. The commissioner may authorize the department to purchase any technical service which, in his judgment, can best be purchased direct under chapter 34, RSMo. The commissioner shall cooperate with the department to purchase timely services appropriate to the needs of the patients, residents or clients of the department.

Section 34.100 provides:

> 1. The commissioner of administration shall have power to authorize any department to purchase direct any supplies which in his judgment can best be purchased direct by such department. He shall prescribe rules under which such direct purchases shall be made; provided, however, that all such direct purchases shall be based upon competitive bids as otherwise required by this chapter. The commissioner in promulgating such rules may establish a procedure for a waiver of competitive bids where the bids received are not acceptable or where a minimum number of bids was not received and may allow for rebidding. The rules also may provide for a waiver of the bid procedure and may allow departments to negotiate the purchase of services for patients, residents, or clients with funds appropriated for this purpose. Each waiver issued by the commissioner shall be valid for no longer than one year and may be renewable by the commissioner. All such direct purchases shall be reported immediately to the commissioner of administration, together with all bids received and prices paid. No claim for payment based upon any such direct purchase shall be certified by the commissioner unless accompanied by such documentation of compliance with the provisions of this chapter as he may require.
>
> 2. The commissioner shall have power to make or to authorize emergency purchases not to exceed the cost of one thousand dollars to be made direct by any department.

It is clear from our quotation of subsection 3 of Section 630.405 that such section and Section 34.100 have to be read together. Under Section 630.405, the Commissioner of Administration

may authorize the Department to purchase technical services which, in his judgment, can best be purchased direct "under chapter 34, RSMo". The Commissioner of Administration, in consultation with the Director, is required to promulgate rules establishing procedures consistent with the usual state purchasing procedures under Chapter 34 for the purchase of services under Section 630.405.

Under Section 34.100, which is incorporated by reference in Section 630.405, the Commissioner of Administration is required to promulgate certain rules including rules for direct purchases. Direct purchases are required to be bid, however, the rules may provide for a waiver of the bid procedure and may allow the department to negotiate the purchase of services for patients, residents, or clients with funds appropriated for that purpose.

The conclusion seems inescapable that the so-called "direct purchases" cannot be made without bids unless the Commissioner of Administration has authorized a waiver of the bid procedure.

We trust this answers your question.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion No. 7-85

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

August 22, 1985

OPINION LETTER NO. 108-85

The Honorable Galen Browning
Representative, District 129
State Capitol Building, Room 201G
Jefferson City, Missouri 65101

FILED
108

Dear Representative Browning:

This letter is in response to your request for a ruling on a prevailing wage issue in the City of Neosho, Missouri. The question posed is:

> Does a public works project, built by the public body come under the requirements of the prevailing wage law set forth in Chapter 290.210-290.340, RSMo 1978?

We understand the project you inquire about involves the City of Neosho, Missouri, and its intention to build a new water treatment facility and to restore existing facilities. As stated in your inquiry, the city intends to build the project with existing city personnel and equipment, it being the opinion of the city that personnel with sufficient skills, abilities and knowledge are available to construct the project, at a cost of $1,500,000 funded by a $1,000,000 bond issue, and $500,000 from the Missouri Clean Water Commission.

In City of Joplin v. Industrial Commission of Missouri, 329 S.W.2d 687 (Mo. 1959), the court stated in reference to the constitutionality of the prevailing wage act:

> ". . . To construe the act as applicable to direct employees of public bodies would make it unconstitutional as to all cities adopting their own charters under the provisions of Section 19, Article VI, of the Constitution because Section 22 of Article VI provides: 'No law shall be enacted creating or fixing

> . . . compensation of any municipal office or employment, for any city framing or adopting its own charter . . . Furthermore, the legislative history of the act indicates an intent to limit its application to employees of contractors constructing public works on contracts with public bodies . . . We, therefore, hold the act does not apply to employees of public bodies. . . .'" Id. at 692.

It is evident then from the language of the court in City of Joplin that the legislative intent in enacting the prevailing wage act was to limit the act's application to employees of contractors constructing public works on contracts awarded by public bodies.

It is also our view that the legislative intent is indicated by Section 290.230, RSMo 1978, which states in part that "[o]nly such workmen as are directly employed by contractors or subcontractors in actual construction work on the site of the building or construction job shall be deemed to be employed upon public works".

We enclose a copy of Opinion No. 351-1970 which is consistent with this opinion.

Further, public bodies which contemplate the building of projects with their own employees should do so very cautiously. Matters which they should consider which are not clear from the question asked include their liability for the direct employees in terms of workers' compensation, unemployment compensation, Social Security, and withholding taxes. The City of Joplin case speaks in terms of direct employees of public bodies. Subcontractors may not necessarily be direct employees. Thus, conceivably the work of subcontractors may require public bidding.

This letter merely addresses the simple question asked. There are many other practical as well as legal considerations which might arise. Those matters should be discussed with the professional engineers and architects involved in the project in the designing or planning stage. Certainly, public dollars should be protected and used in the most economical manner possible. Yet, the quality of the workmanship and the professional completion of a project depends on the quality of the services as opposed to the economy of the services.

Thus, extreme care should be used in applying the principles set out in response to your question. That care should involve

consultation with the professionals who are familiar with this type of project, that is, water treatment facilities and restoration of existing facilities. Bidding on public works projects historically results in a method of construction guaranteeing proper plans and specifications. It provides a system of checks and balances between the functions of construction and inspection. It provides safeguards against the liability of elected officials and protects the taxpayers. Additionally, if federal monies are involved, the city officials must consider the federal involvement and their liability therefor.

Thus, to simply say that the Missouri prevailing wage law does not apply to direct public employees may not adequately address other important considerations which afford even greater protection for the taxpayer and the taxpayer's dollar.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosure:

Opinion No. 351-1970

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

July 22, 1985

OPINION LETTER NO. 112-85

FILED
112

The Honorable Margaret Kelly, CPA
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Ms. Kelly:

This letter is in response to your question asking:

> Is it legally permissible in computing the preceding valuation factor for school districts to adjust upward the valuations of state assessed property to eliminate the effect, as near as possible, of the blanket reductions made by the State Tax Commission in the assessed valuation of certain state property?

Section 137.073.1(2) of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session, defines the term "preceding valuation factor" to include an adjustment for "blanket assessment changes". The phrase "blanket assessment changes" is undefined.

The State Tax Commission made blanket adjustments in the level of assessment of state-assessed property other than railroads, airlines, and bridge companies beginning in 1981. In 1981, the thirty-three and one-third percent (33.33%) statutory assessment ratio was reduced to thirty-one and one-eighth percent (31.125%). In 1982, the assessment ratio was reduced to twenty-eight and ninety-seven one-hundredths percent (28.97%). In 1983, the assessment ratio was reduced to twenty-six and seventy-eight one-hundredths percent (26.78%). In 1984, the assessment ratio was reduced to twenty-five percent (25%). Beginning in 1976, state-assessed railroad property had its assessment ratios reduced to the average level of assessment in each county as determined by the State Tax Commission's annual ratio study.

We believe that the blanket changes made by the State Tax Commission, as described above, are "blanket assessment changes" referred to in Section 137.073.1(2) of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session. This new law makes it clear that state-assessed property is in the "property base" in the calculation of tax rate rollbacks for school districts.

Accordingly, in calculating preceding valuation factors for school district tax rate rollbacks, the valuations of state-assessed property shall be adjusted upward to eliminate the effect, as near as possible, of the blanket reductions made by the State Tax Commission in the assessed valuations of certain state-assessed property.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

July 22, 1985

OPINION LETTER NO. 113-85

The Honorable William J. Icenogle
Prosecuting Attorney, Camden County
Post Office Box 697
Camdenton, Missouri 65020

FILED
113

Dear Mr. Icenogle:

This letter is in response to your question asking:

> Pursuant to Section 136.150 RSMo, must the County Commission of a 3rd Class County set aside one-half of the 20% delinquent tax collection fee in a separate account for the unrestricted, discretionary use of the County Prosecuting Attorney.

Section 136.150, RSMo Supp. 1984, states:

> The attorney general shall furnish legal advice to the director of revenue. He shall commence legal proceedings and conduct legal actions for the collection of delinquent taxes, licenses and fees, referred to him for collection by the director of revenue. The state director of revenue shall have the power to call upon circuit attorneys or prosecuting attorneys for assistance in the collection of delinquent taxes, licenses and fees; provided, however, that such taxes, licenses and fees collected in any proceeding or action by the attorney general or by any circuit or prosecuting attorney shall be paid to and received by the director of revenue; except that, the state shall pay, from funds appropriated by the general assembly for such purpose, a collection fee of twenty percent of the delinquent tax, license, or fee recovered by the circuit attorney

> or prosecuting attorney. The collection fee shall be deposited in the county treasury, with one-half of such collection fee being designated for the use of the prosecuting or circuit attorney's office and one-half of such fee to be expended as the county shall determine.

County funds may be budgeted as a matter of law if a statute or other authority imposes a mandatory, nondiscretionary duty on the county to allocate those funds in a particular manner. State ex rel. Robb v. Poelker, 515 S.W.2d 577, 579 (Mo. banc 1974); Opinion Letter No. 242, Peterson, 1980, copy enclosed. We believe that the one-half of the delinquent tax collection fees designated for use by the prosecuting attorney's office are allocated to the prosecuting attorney's office as a matter of law if such funds are not actually budgeted by the county commission. Generally, though, the county budget will include funds that are budgeted as a matter of law. See Section 50.550, RSMo 1978 (county budget presents a complete financial plan for the county).

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

August 26, 1985

OPINION LETTER NO. 114-85

Dr. Arthur L. Mallory
Commissioner of Education
Post Office Box 480
515 East High
Jefferson City, Missouri 65102

FILED
114

Dear Commissioner Mallory:

This letter is in response to your request for an opinion of this office asking the following question:

> In order for a local public school district to receive state foundation aid money under Section 163.031, RSMo, must the average daily attendance and membership be determined on the basis of full-time equivalence as specified in section 163.012, RSMo?

Chapter 163, RSMo, contains provisions relating to financial aid given by the state to local school districts for elementary and secondary education. Section 163.012, RSMo Supp. 1984, provides as follows:

> For state aid and all other school purposes, membership and average daily attendance shall be determined on the basis of full-time equivalence in the same manner as specified for part-time students in section 163.011.

This section was recently enacted as a new provision in Chapter 163. L. 1984 H.B. 1456 and 1197.

Section 163.011, RSMo Supp. 1984, which was not changed by H.B. 1456 and 1197, contains definitions for use in Chapter 163. The paragraphs of Section 163.011 implicated by Section 163.012 are as follows:

> (2) "Average daily attendance" means the quotient or the sum of the quotients obtained by dividing the total number of days

attended in a term by resident pupils in grades kindergarten through twelve, inclusive, and between the ages of five and twenty by the actual number of days in that term but not including legal school holidays and legally authorized teachers' meetings. To the average daily attendance of full-time students shall be added the full-time equivalent average daily attendance of part-time students and the full-time equivalent average daily attendance of summer school students. "Full-time equivalent average daily attendance of part-time students" shall be computed by dividing the total hours attended by resident part-time students who are not subject to the provisions of section 167.031, RSMo, by the number of hours school was in session that term. "Full-time equivalent average daily attendance of summer school students" shall be computed by dividing the total number of hours attended by all summer school pupils by the number of hours in the regular school term;

* * *

(7) "Membership" shall be determined by dividing by two the sum of (1) the number of resident full-time students and the full-time equivalent number of part-time students who were enrolled in the public schools of the district on the last Wednesday in September of the previous year and who were in attendance one day or more during the preceding ten school days, (2) the number of resident full-time students and the full-time equivalent number of part-time students who were enrolled in the public schools of the district on the last Wednesday in January of the previous year and who were in attendance one day or more during the preceding ten school days, and (3) the full-time equivalent number of summer school pupils. "Full-time equivalent number of part-time students" is determined by dividing the total number of hours for which all part-time students are enrolled by the number of hours in the regular school term. "Full-time equivalent number of summer school pupils" is determine by dividing the

> total number of hours for which all summer school pupils were enrolled by the number of hours in the regular school term. "Full-time equivalent number of kindergarten pupils" is determined by dividing the number of such pupils in membership by two;

[Underscoring indicates bold-faced print in RSMo Supp. 1984.]

The terms "average daily attendance" and "membership" stand for certain formulas which are used throughout Chapter 163 to determine how much state aid a particular school district will receive. From your opinion request it appears that a problem has arisen about whether Section 163.012 changed the way in which the formulas for these two terms are determined because H.B. 1456 and 1197 did not expressly repeal those parts of paragraphs (2) and (7) which conflict with Section 163.012. The question then is what effect does Section 163.012 have on the determinations of average daily attendance and membership.

"Full-time equivalent" is determined for part-time students in Section 163.011 in the third sentence of paragraph (2) and in the second sentence of paragraph (7). Both determinations use a formula by which total hours attended by the students are divided by the hours that the school is in session. This is in contrast with the formula for average daily attendance and membership contained in the preceding parts of the respective paragraphs which utilized the number of days attended by students as divided by the number of days in the term. The difference made by Section 163.012, then, in regard to full-time students is that a formula which is computed in hours as opposed to days is to be used to determine average daily attendance and membership. This makes a difference because now the time spent at school by a full-time student who does not stay the entire day, for instance, because of illness, can still be counted toward the formula by which state aid to that school district is determined. Before Section 163.012 became effective, a partial day in school by such a student was lost to the school district in regard to a determination of the amount of state aid because the student was not there an entire day.

Whether the provisions of Section 163.012 should control over those conflicting parts of paragraph (2) and (7) of Section 163.011 which directly define "average daily attendance" and "membership", respectively, is determined by the rules of statutory construction approved in Colabianchi v. Colabianchi, 646 S.W.2d 61 (Mo. banc 1983). In that case, the court was faced with contradictory statutes. Section 452.305.2 which had been

enacted in 1973 required a circuit court to grant a legal separation but not a dissolution of marriage if one party requested it. However, an amendment in 1977 to Section 452.320.1 required the court to dissolve the marriage if both parties stated that the marriage was irretrievably broken. In the Colabianchi situation, both parties agreed that the marriage was irretrievably broken but one had requested by way of cross petition a legal separation rather than a dissolution. The court held that the later enacted statute prevailed.

> This contention must fail because to the extent that Section 452.305.2 is contrary to the later enacted provisions of Section 452.320.1 the latter prevails. Where there are two acts on one subject, both should be given effect if possible, but if they are repugnant in any of their provisions, the later act, even sans a specific repealing clause, operates to the extent of the repugnancy to repeal the first. City of Kirkwood v. Allen, 399 S.W.2d 30, 34 (Mo. banc 1966). See also, State on Inf. of Taylor v. American Insurance Company, 355 Mo. 1053, 200 S.W.2d 1,14 (Mo. banc 1946) and State ex rel. Armontrout v. Smith, 353 Mo. 486, 182 S.W.2d 571, 574 (Mo. banc 1944), and this is true even though the law does not favor repeal by implication.

Colabianchi v. Colabianchi, supra, at 63.

Section 163.012 is the later enacted statute. It was enacted in 1984. See, L. 1984, H.B. 1456 and 1197. At that time, Section 163.011 had been last amended in 1982. See, A. L. 1982, adopted by initiative, Proposition C, November 2, 1982. The provision of Section 163.012 which contradicts the definition of average daily attendance and membership in Section 163.011 prevails.

Therefore, it is our view that average daily attendance and membership must be determined on the basis of full-time equivalence as specified in Section 163.012, RSMo Supp. 1984.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

SCHOOL AID:
SCHOOLS:
TAXATION -- PROPERTY:
TAX RATE ROLLBACK:

After the general assessment tax rate reduction, school districts may not increase their tax levies above the "tax rate ceiling" without voter approval, as provided for in Section 137.073.7, as enacted by Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session. However, school districts will not be disqualified from receiving state aid under the Excellence in Education Act of 1985, Conference Committee Substitute No. 2 for Senate Committee Substitute for House Committee Substitute for House Bill No. 463, Eighty-Third General Assembly, First Regular Session, if they would have qualified for such aid but for the reduction required by Section 137.073 of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session.

October 16, 1985

OPINION NO. 122-85

FILED
122

Arthur L. Mallory, Ph.D.
Commissioner of Education
Missouri Department of Elementary
and Secondary Education
Post Office Box 480
515 East High
Jefferson City, Missouri 65102

Dear Dr. Mallory:

This opinion is in response to the following question:

> Does a local board of education have the authority under Section 11(b) of Article X of the Missouri Constitution to establish a tax of one dollar and twenty-five cents on the hundred dollars assessed valuation after rollback due to reassessment?

Your office has also asked us to address the following question: If a local board of education is unable to impose an operating levy in excess of the levels authorized by Article X, Section 11(b), Missouri Constitution, after the tax rate rollback provided for in Section 137.073 of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session, is implemented, will that school district be eligible for the funds provided for in the Teachers' Pay Plan Program, Section 163.171 of the Excellence in Education Act of 1985, Conference Committee Substitute No. 2 for Senate Committee

Arthur L. Mallory, Ph.D.

Substitute for House Committee Substitute for House Bill No. 463, Eighty-Third General Assembly, First Regular Session, and the Missouri Career Development and Teacher Excellence Plan, Section 168.500 of the Excellence in Education Act of 1985.

I.

Can School Districts Increase Their Operating Levies After Tax Rate Rollback Without a Vote of the People?

Article X, Section 11(b), Missouri Constitution, provides in part:

> Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:
>
> * * *
>
> For school districts formed of cities and towns, including the school district of the city of St. Louis -- one dollar and twenty-five cents on the hundred dollars assessed valuation;
>
> For all other school districts -- sixty-five cents on the hundred dollars assessed valuation.

Article X, Section 11(c), Missouri Constitution, provides for voter-approved tax rate increases for schools and certain other political subdivisions. Thus, in order to impose a levy in excess of that provided for in Missouri Constitution Article X, Section 11(b), a school district must get voter approval of such.

Section 137.073.7 of Senate Committee Substitute For Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session, states:

> 7. (1) In all school districts, tax rates reduced or revised pursuant to this section or section 22 of article X of the Missouri Constitution or when a court has determined and ordered the tax rate reduction, or revision, may be increased, in increments or otherwise:

> (a) Above the tax rate set as a result of such reduction or revision, up to and including the rate in effect on November 4, 1980, or up to and including a higher rate adopted after November 4, 1980, in the manner authorized by law, by the approval of a majority of the qualified voters of the school district voting on the proposition; provided that, the provisions of this subdivision shall apply only if the tax rates, after the increase, will be three dollars seventy-five cents or less;
>
> (b) Above the rate in effect on November 4, 1980, or above a higher rate adopted after November 4, 1980, in the manner authorized by law, or above three dollars seventy-five cents, only by the approval of that majority of the qualified voters of the school district voting on the proposition as required by section 11(c) of article X of the Missouri Constitution.
>
> (2) The governing body of any school district may levy a tax rate lower than its rate ceiling and may increase that lowered tax rate to a level not exceeding the tax rate ceiling, without voter approval. As used in this subdivision, the term "tax rate ceiling" shall also include any reductions mandated by section 164.013, RSMo.

(Emphasis added.)

Paragraph (2) of Section 137.073.7 authorizes a non-voter-approved tax rate increase, but only up to the "tax rate ceiling" after the tax rate has been reduced pursuant to the applicable rollback. Subparagraphs (a) and (b) of Section 137.073.7(1) both require voter approval of tax rate increases.

It could be argued that the General Assembly cannot impose a voter approval requirement on a constitutionally provided for levy that imposes no such voter approval requirement. However, the voter approval requirements of subparagraphs (a) and (b) of Section 137.073.7(1) are authorized by Article X, Section 10(c), Missouri Constitution, which states:

> The general assembly may require by law that political subdivisions reduce the rate

> of levy of all property taxes the subdivisions impose whether the rate of levy is authorized by this constitution or by law. The general assembly may by law establish the method of increasing reduced rates of levy in subsequent years.

Accordingly, we conclude that school district operating levies may not be increased above the "tax rate ceiling" without voter approval, as provided for in Section 137.073.7, as enacted by Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session.

II.

If a School District is Unable to Impose an Operating Levy in Excess of the Level Authorized by Article X, Section 11(b), Missouri Constitution, After the Tax Rate Rollback, is the School District Still Eligible for Funds Under the Teachers' Pay Plan Program and the Missouri Career Development and Teacher Excellence Plan?

In part, Section 163.171 of the Excellence in Education Act of 1985 requires the Department of Elementary and Secondary Education to develop a plan to increase public school teachers' salaries in Missouri.

Subsections 3 and 5 of Section 163.171 provide:

> 3. Any school district which has personnel whose salary is determined to be below a level established in accordance with the plan for increasing teachers' salaries established under this section and who has met the requirements of this section and any subsequent guidelines established by the state board of education, with the advice of the commissioner of education, shall receive state aid for the sole purpose of increasing such salaries. Such guidelines shall recognize that the reassessment of real property and the applicable reduction or revision of property tax levies pursuant to section 137.073, RSMo, may cause some school districts to levy a tax below one dollar and twenty-five cents for each hundred dollars of assessed

> valuation. Such school districts shall not be penalized under the guidelines for this program during the school years 1986-87 and 1987-88.
>
> * * *
>
> 5. The department of elementary and secondary education shall review and determine the local effort[,] ability and performance of each school district. In order to receive funds under this section, a school district must have a total levy for operating purposes which is in excess of the amount allowed in section 11(b) of article X of the Missouri Constitution. Each school district shall maintain a regular salary schedule, which shall be funded by revenues other than those provided in this section, and which shall show appropriate increases in funding due to revenues received from all other sources. If a school district fails to meet requirements of this subsection, such district shall not receive any revenues under this section until the failures have been corrected.

(Emphasis added.)

Section 168.500 of the Excellence in Education Act of 1985 creates the Missouri Career Development and Teacher Excellence Plan and requires the General Assembly to make annual appropriations therefor. Subsection 6 of Section 168.500 provides: "In order to receive funds under this section, a school district must have a total levy for operating purposes which is in excess of the amount allowed in section 11(b) of article X of the Missouri Constitution."

Subsection 4 of Section 137.073 of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session, states in part: "Notwithstanding other provisions of law, tax rates for public schools and libraries may be reduced, pursuant to this section, below rates established as minimal entitlement levels for participation in state aid funds without loss in such entitlement." Generally, the "Notwithstanding other provisions of law" or similar language is used by the General Assembly to impliedly repeal inconsistent provisions. See, e.g., Edwards v. St. Louis County, 429 S.W.2d 718 (Mo. banc 1968). We believe that the quoted subsection 4 language impliedly repeals

or modifies inconsistent provisions in Sections 163.171 and 168.500 of the Excellence in Education Act of 1985 and any other inconsistent statutory provisions, see, e.g., Section 163.021(3), RSMo Supp. 1984. This means that a public school district will not be disqualified from receiving state aid under the Excellence in Education Act of 1985 if it would have qualified for such aid but for the reduction required by Section 137.073 of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session.

Finally, we note the existence of the following language in Section 137.073.5(2) of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session:

> It is further the intent of the general assembly, under the authority of section 10(c) of article X of the Constitution of Missouri, that the provisions of this section be applicable to tax rate reductions or revisions mandated under section 22 of article X of the Constitution of Missouri as to reestablishing tax rates as reduced or revised in subsequent years, enforcement provisions, and other provisions not in conflict with section 22 of article X of the Constitution of Missouri; except that, in calculating tax rates in the year subsequent to a tax reduction or revision under section 22 of article X of the Constitution of Missouri, a school district may modify its "tax rate ceiling" in such a manner as to recapture any loss in state school aid occasioned by establishing its "tax rate ceiling" as required by section 22 of article X of the Constitution of Missouri. . . .

(Emphasis added.)

As we have interpreted the language of subsection 4 of Section 137.073 of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session, as exempting school districts from any loss of state aid due to either a Hancock Amendment or a statutory general reassessment tax rate rollback, we do not find the subsection 5(2) language quoted above controlling in these circumstances.

Arthur L. Mallory, Ph.D.

CONCLUSION

It is the opinion of this office that after the general assessment tax rate reduction, school districts may not increase their tax levies above the "tax rate ceiling" without voter approval, as provided for in Section 137.073.7, as enacted by Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session. However, school districts will not be disqualified from receiving state aid under the Excellence in Education Act of 1985, Conference Committee Substitute No. 2 for Senate Committee Substitute for House Committee Substitute for House Bill No. 463, Eighty-Third General Assembly, First Regular Session, if they would have qualified for such aid but for the reduction required by Section 137.073 of Senate Committee Substitute for Senate Bill No. 152, Eighty-Third General Assembly, First Regular Session.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

CHILD ABUSE:
FAMILY SERVICES, DIVISION OF:
SOCIAL SERVICES, DEPARTMENT OF:
YOUTH SERVICES, DIVISION OF:

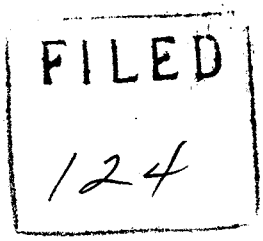
Concerning the screening of child care providers and employees under Senate Bill 401, 83rd General Assembly, First Regular Session,

Sections 210.150 and 210.800 to 210.837, RSMo Supp. 1985, hospitals and public schools do not come within the definition of "provider" and are not subject to the screening and disqualification requirements; a nationwide criminal review will be done on employees of providers; public elementary and secondary schools may request examinations of the central registry; exemptions may be granted to employees of the divisions of Youth Services and Family Services; and related questions.

December 31, 1985

OPINION NO. 124-85

Mr. Joseph J. O'Hara, Director
Department of Social Services
Broadway State Office Building
P. O. Box 1527
Jefferson City, MO 65102



Dear Mr. O'Hara:

This opinion is in response to your request for an opinion concerning Senate Bill 401, 83rd General Assembly, First Regular Session, Sections 210.150 and 210.800 to 210.837, RSMo Supp. 1985. (All references to the sections of S.B. 401 are made according to the section numbers provided in RSMo Supp. 1985 which differ in some instances from the numbering of the sections in the bill.) As set forth in its title, the bill is "for the purpose of authorizing the screening of child care providers and their employees . . . ." The bill sets up a system of screening child care providers and their employees to determine which of them will be disqualified from serving as providers or employees of providers.

Providers are defined in Section 210.800(5) as follows:

> (5) "Provider" includes licensed day care homes; licensed day care centers; licensed child placing agencies; licensed residential care facilities for children, including group homes; licensed foster family group homes; licensed foster family

> homes; juvenile courts and other local or state agencies providing or having care or custody of a child for twenty hours or more per week.

In that same section, the bill also provides a definition of employees as follows:

> (4) "Employees" include staff, operators and volunteers who do or will provide care to children directly or indirectly;

The screening of the employees is in reference to the bill's prohibition against the provider employing anyone who has committed certain acts. The prohibition is set forth in Section 210.809 as follows:

> "No provider shall employ any employee who has been determined by the provider or by the division [Family Services] to have committed acts which have been harmful to a child or which demonstrate a likelihood of harm to a child." [Emphasis added]

The underscored phrase is defined at Section 210.800(1) as including two types of acts. First, the phrase includes convictions for offenses designated in subdivision (1); and second, it includes "noncriminal child abuse which resulted in the physical, mental or emotional abuse and neglect, or sexual abuse of a child and which is substantiated and documented by state social workers but not necessarily proven in court;".

The prohibition against employing persons identified in Section 210.809 is not necessarily absolute. The General Assembly has also set up two exemptions in Section 210.805.2 which apply when an employee or potential employee falls within the disqualification set forth in Section 210.809. However, neither of these exemptions is applicable when an employee or potential employee has a conviction for "acts which have been harmful to a child or which demonstrate a likelihood of harm to a child as defined in Section 210.800 of this act." Therefore, the exemptions apply only to those who have committed the "noncriminal child abuse" described in Section 210.800(1). The first exemption is set forth as follows:

> 2. After review of the record and before adverse action may be taken by the division [of Family Services], or by an employer or potential employer, the division

> shall grant an exemption from disqualification for licensure or for employment by a provider unless the division has substantial and convincing evidence to support a reasonable belief that the applicant or employee or potential employee committed the alleged offense.

This provision is not so much an "exemption" as it is a requirement that an employee or potential employee cannot be disqualified from employment until the division has sufficient evidence to support a reasonable belief that the person in question actually committed "the offense".

Once it is determined that an employee or potential employee has committed noncriminal child abuse as described in Section 210.800(1), he must not be allowed in the employ of the provider unless and until the division decides to grant the second type of exemption, the "good character" exemption, which is set forth in the remaining portion of Section 210.805.2. That exemption is established as follows:

> "The division may grant an exemption from disqualification for licensure or for employment by a provider, if the division has substantial and convincing evidence to support a reasonable belief that the applicant or the employee or prospective employee is of such good character as to justify issuance of a license or granting of an exemption pursuant to this section."

The statute then describes the factors which must be considered in determining whether this "good character" exemption should be granted.

Provisions relating to the system by which the information is gathered to screen employees and by which records on such are kept are in Sections 210.150, 210.814 and 210.826. These will be dealt with to the extent necessary to answer your questions later in this opinion.

Providers who violate the provisions of this bill may have their license revoked or be subject to injunctive action. Providers who violate provisions of this bill are also subject to being convicted of a misdemeanor. Section 210.835.3 and .5. Employees who violate this law are subject to conviction for a felony. Section 210.835.1. Finally, the law provides in Section 210.837 an immunity from suit for employers or providers

who decline to employ or terminate a person based on the provisions of this law.

Each of the nine questions which you asked is set forth below followed by this office's response.

1. Are hospitals subject to the requirements of S.B. 401?

2. Are public elementary and secondary schools subject to requirements of S.B. 401?

Whether hospitals and public elementary and secondary schools come within the screening and disqualification requirements of S.B. 401 depends on whether they come within the term "provider". Section 210.800(5) defines "provider" as follows:

> (5) "Provider" includes licensed day care homes; licensed day care centers; licensed child placing agencies; licensed residential care facilities for children, including group homes; licensed foster family group homes; licensed foster family homes; juvenile courts and other local or state agencies providing or having care or custody of a child for twenty hours or more per week. [Emphasis added]

If a provider "knowingly employs a person in violation of Section 210.800 to 210.830" or if a provider "knowingly fails to obtain and maintain the information and records required by Section 210.800 to 210.837" he is guilty of a Class A misdemeanor. See subsections 2 and 3, respectively, of Section 210.835. Therefore, this law must be interpreted under the principles applicable to criminal statutes as those are set forth in State v. McClary, 399 S.W.2d 597, 599 (K.C.App., Mo. 1960):

> Criminal statutes must, indeed, be strictly construed, strictly against the state and liberally in favor of the accused . . . . No person can be made subject to a criminal statute by guesswork or mere implication . . . . "A criminal statute is not to be held to include offenses or persons other than those which are clearly described and provided for both within the spirit and letter of the statute, and, if there is a fair doubt as to whether the act

> charged and proved is embraced within the prohibition, that doubt will be resolved in favor of the accused." State v. Hall, Mo.App., 351 S.W.2d 460, 463; State v. Dougherty, 358 Mo. 734, 216 S.W.2d 467, 471.
>
> Thus a penal statute creating a new offense must be sufficiently clear to inform those sought to be subjected to it just what conduct on their part will render them liable to its penalties. "Statutes and ordinances which fix crimes, or quasi crimes, should so fix them that there can be no uncertainty. They should be so worded that one could read them, and know whether or not he was violating the law." Ex parte Taft, 284 Mo. 531, 544, 225 S.W. 457, 461; Ex parte Hunn, 357 Mo. 256, 207 S.W.2d 468, 470.
>
> "The reason of the rule (of strict construction) is found in the tenderness of the law for individuals, and on the plain principle that the power of punishment is fixed in the legislature, and not in the judicial department. It is the duty of the legislature, and not the courts, to define a crime, and ordain its punishment." State v. Reid, 125 Mo. 43, 28 S.W. 172, 173. These rules must prevail even though courts may think that the legislature ought to have made a law more comprehensive and that by failing to do so it failed to accomplish a salutary purpose. [Citations omitted]

A criminal statute may not be so vague "that men of common intelligence must necessarily guess at its meaning and differ as to its application." St. Louis County v. McBride and Son, Inc., 487 S.W.2d 878, 879 (Mo.App., St.L.D. 1972). That a criminal statute must be strictly construed means that it "can be given no broader application than is wanted by its plain and unambiguous terms." City of Charleston v. McCutcheon, 360 Mo. 157, 227 S.W.2d 736 (banc 1950).

In addition to these principles, the rule of statutory construction called "ejusdem generis" is also implicated because the legislative intent and language is unclear and because the term "provider" is defined by the listing of specific entities which are followed by general words of description. Hospitals

and public elementary and secondary schools are not listed specifically and, therefore, are providers only if they come within the meaning of the phrase "other local or state agencies providing or having care or custody of a child for twenty hours or more per week." Whether they are so included must be decided also under the application of the following principle:

> "'. . . where a statute contains general words only, such general words are to receive a general construction, but, where it enumerates particular classes or things, followed by general words, the general words so used will be applicable only to things of the same general character as those which are specified.'"

State v. Lancaster, 506 S.W.2d 403, 405 (Mo. 1974), quoting McCaren v. G. S. Robins and Company, 349 Mo. 653, 162 S.W.2d 856 (1942).

The general character of the entities specified in the definition of provider is that they all exist for the primary purpose of providing parental or family type care to children. That character is revealed in the statutory and related rule provisions establishing the licensing and regulation of those entities. For instance, day care homes and day care centers are required to provide a "supplement to parent responsibility for the child's protection, development, and supervision." 13 CSR 40-61.010(1) and 13 CSR 40-62.010(1). Residential care facilities, group homes and foster family homes are responsible for providing on a twenty-four hour basis the whole gamut of care for a child's physical, social, emotional, moral and religious needs that typify parental or family type care. See 13 CSR 40-71.070, 72.010(2) and 60.050, respectively. The manifest purpose of these agencies is to take the place of the family, at least temporarily, and provide the child with a family environment.

Child placing agencies share this same concern since they place children into situations which provide a family type of care. 13 CSR 40-73. Juvenile courts exercise similar functions in regard to care of children in their custody and in regard to their disposition or placement of children who come before them.

In contrast, schools and hospitals neither provide this comprehensive family type care nor resemble child placing agencies and juvenile courts. They fulfill a much narrower function, schools providing an education and hospitals providing medical care. Neither traditionally provides nor is required by

law to provide all those needs of a child covered under the concept of parental or family type care.

Therefore, taking into consideration the rules of strict construction applicable to criminal statutes and the rules applied to interpreting general words following a specific listing in a definition, this office is of the opinion that hospitals and public elementary and secondary schools do not come within the definition of provider and are not subject to the screening and disqualification requirements of S. B. 401.

3. If public elementary and secondary schools are not subject to the requirements of S.B. 401, may they voluntarily submit to the Division of Family Services (DFS) names of an employee or prospective employee for DFS to conduct a nationwide criminal record review, in accordance with Section 210.826 of S.B. 401, and to screen central registry reports to determine if the individual has committed an "act which has been harmful to a child or which demonstrates a likelihood of harm to a child" [as that term is defined by Section 210.800(1)]?

In response to your question 2, this office determined that public elementary and secondary schools are not subject to the requirements of S.B. 401. Thus, a response to your question 3 is in order. A review of the pertinent sections of S.B. 401 is necessary to formulate a response to this question.

First, Section 210.826 provides:

> For all employees or prospective employees, the division shall conduct a nationwide criminal record review. Each provider shall submit to the division within fourteen days of employment of the prospective employee the name, nicknames, all aliases, date of birth, full residential address, social security number, race, sex and such other information as the division may reasonably require, which may include but is not limited to finger prints. The division shall not charge the provider a fee for conducting a criminal record review pursuant to Sections 210.800 through 210.837, except that the division shall require the provider to reimburse the division for any and all costs of obtaining a criminal record clearance from

> the Federal Bureau of Investigation if such clearance is determined by the division to be necessary. Any fees received by the division pursuant to this Section shall be deposited in the General Revenue Fund of this state.

This section, by the use of the term "provider", which is defined in Section 210.800(5), contemplates that the nationwide criminal record review will be done on employees or prospective employees of "providers." In response to the first part of your question, then, this service is accessible only to providers. There is no provision in S.B. 401 for those agencies or organizations which wish to voluntarily submit names of employees or prospective employees.

In regard to the second part of your question concerning screening the central registry reports, Section 210.150 provides in pertinent part:

> 1. All reports and records made pursuant to sections 210.110 to 210.165 and maintained by the division, its local offices, the central registry, and other appropriate persons, officials, and institutions pursuant to section 210.110 to 210.165 shall be confidential. For the purpose of this section, "subjects" include the child and any parent, guardian, or other person responsible for the child, who is mentioned in a report. "Reporters" include all persons and institutions who report abuse or neglect pursuant to sections 210.110 to 210.165. Information shall not be made available to any individual or institution except to:
>
> * * *
>
> (6) All licensed day care homes; licensed day care centers; licensed child placing agencies; licensed residential care facilities, including group homes; juvenile courts, public and private elementary schools, public and private secondary schools, and other state agencies providing or having care or custody of a child who shall request an examination of the central registry from the division for all employees and volunteers or prospective employees and

> volunteers, who do or will provide services or care to children either directly or indirectly. Examinations of the central registry shall be mandated for facilities including, but not limited to, foster homes used by the above agencies or courts for the placement of children. Requests for examinations shall be made to the division director or his designee in writing by the chief administrative officer of the above homes, centers, public and private elementary schools, public and private secondary schools, agencies, or courts. The division shall respond in writing to that officer. The response shall include information pertaining to the nature and disposition of any report or reports of abuse or neglect revealed by the examination of the central registry. This response shall not include any identifying information regarding any person other than the alleged perpetrator of the abuse or neglect; [Emphasis added]

Thus public elementary and secondary schools may request an examination of the central registry for information contained in it.

4. May exemptions be granted, pursuant to Section 210.805 of Senate Bill 401, to potential employees of the Department of Social Services?

At the outset, it is important to realize that the Department of Social Services is made up of divisions which are legally separate and distinguishable entities in their own right. There are numerous Missouri decisions which have addressed the issue of whether a particular state agency is a legally recognizable entity. See, Parker v. Unemployment Compensation Commission, 358 Mo. 365, 214 S.W.2d 529, 534 (1948); State ex rel Highway Commission v. Day, 327 Mo. 122, 35 S.W.2d 37, 39 (banc 1930); State ex rel Goldman v. Missouri Workman's Compensation Commission, 325 Mo. 153, 27 S.W.2d 1026, 1029 (banc 1930); and State ex rel. Gehr v. The Public Service Commission of Missouri, 338 Mo. 177, 90 S.W.2d 390, 394 (1935).

Among the divisions within the Department of Social Services which are clearly separate legal entities, there are the Division of Family Services and the Division of Youth Services. The Division of Family Services is created by statute, Section 207.010, RSMo 1978, and Section 660.010(7), RSMo 1984

Supp. The Division of Family Services has a wide range of powers and responsibilities which lead to its recognition as a separate legal entity. See Section 207.020, RSMo 1984 Supp. The Division of Youth Services is created by Section 219.011, RSMo 1978 and Section 660.010.14, RSMo 1984 Supp. The Division of Youth Services also has a wide range of powers and aspects which indicate that it is a legal entity distinguishable from the Department. See Section 219.016, RSMo 1978. Accordingly, it is this office's opinion that these divisions are distinct entities and considered "state agencies" under the definition of "provider" in Section 210.800(5).

Whether these divisions come within the rest of the definition of "provider" depends on whether they provide or have "care or custody of a child for twenty hours or more per week". As set forth in the answer to questions 1 and 2, above, the principles of strict construction and of ejusdem generis are applicable to this issue. An examination of the statutory duties of these two divisions demonstrates clearly that they are responsible for providing the parental or family type care which characterizes those entities specifically listed in the definition of provider. According to statute, the Divisions of Family Services and Youth Services have programs by which they provide such care or custody. Pursuant to Section 660.010.7, RSMo 1984 Supp., all powers, duties and functions of the old division of welfare were transferred to the Division of Family Services, which is "construed to mean the division of family services of the department of social services." One of the duties and functions of the Division of Family Services is to provide for custody and care of children pursuant to juvenile court decrees. Section 207.020.1(17), RSMo 1984 Supp.

The Division of Youth Services, pursuant to Section 219.021.1, RSMo 1984 Supp., can be awarded the custody of certain minor children. In addition, the Division also provides for the "care" of a child. Section 219.016.2(1), RSMo 1978, provides the Division shall be responsible for "providing for the reception, classification, care, activities . . . of all children committed to the Division;". Additionally, pursuant to Section 219.021.7, RSMo 1984 Supp., the Division of Youth Services operates facilities where the minor children actually live.

Clearly, these divisions are "state agencies" which have programs "providing or having care or custody of a child for twenty hours or more per week." Therefore, they are providers under Section 210.800(5).

As providers, then, the divisions are bound by Section 210.809 not to employ anyone who has been determined to

have committed acts which have been harmful to a child or which demonstrate a likelihood of harm to a child. However, there are two "exemptions" to this prohibition provided for in Section 210.805.2. That subsection provides in part as follows: ". . . The Division shall grant an exemption from disqualification for licensure or for employment by a provider unless . . . . The division may grant an exemption from disqualification for licensure or for employment by a provider, if the division . . . ." [Emphasis added]

It is important to remember that a principle of statutory construction is that every word and phrase must be given some meaning, if possible. Union Electric Company v. Morris, 359 Mo. 564, 222 S.W.2d 767 (1949). The General Assembly provides that an exemption could be granted in the case of a "disqualification for licensure or for employment by a provider". The use of the word "or" is a disjunctive and ordinarily means "either". Norberg v. Montgomery, 351 Mo. 180, 173 S.W.2d 387 (1943) and Dodd v. Independent Stove and Furnace Company, 330 Mo. 662, 51 S.W.2d 114 (1932).

Applying the ordinary definition to the term "or", it becomes obvious that an exemption is not limited only to a applicant for a license, because the provisions reference "the applicant or the employee or potential employee".

Therefore, it is the opinion of this office that, since these exemptions are from disqualifications for employment "by providers", they may be granted to prospective employees of those divisions within the Department of Social Services which are providers. Of course, the prohibition in Section 210.805.4 against granting exemptions to those who have been convicted for certain types of offenses applies also to prospective employees of these divisions.

5. Does Senate Bill 401 apply to the Division of Youth Services/Department of Social Services (DYS/DOSS) employees who are never in contact with clients?

The answer to this question depends on whether the Division of Youth Services is a "provider" and, if so, whether the employees concerned come within the definition of "employees" contained in Section 210.800(4). The first issue is answered affirmatively in the answer to question 4. The second issue can be addressed only in reference to the following definition of "employees" contained in Section 210.800(4):

> (4) "Employees" include staff, operators and volunteers who do or will provide care to children directly or indirectly;"

The coverage of S.B. 401 is not limited to those Division of Youth Services employees who are actually in physical contact with the minor children. The use of the word "or" is a disjunctive which generally means "either". See Dodd v. Independent Stove and Furnace Company, supra, and Norbert v. Montgomery, supra. The meaning of "directly or indirectly" has been defined in Rust v. Missouri Dental Board, 348 Mo. 616, 155 S.W.2d 80, 83 (banc 1941). The court defined "indirectly" as "not directly, obliquely, in a roundabout way . . ." Additionally, Black's Law Dictionary, Fourth Edition, 1968, defines "indirect" as "not direct in relation or connection; not having an immediate bearing or application . . ." Therefore, S.B. 401 is applicable to employees who are never in contact with client children if these employees "do or will provide care to [these] children . . . indirectly." This could certainly include support and supervisory personnel.

Any other interpretation of S. B. 401 would lead to an absurd result. It is entirely unreasonable to assume that the General Assembly would have passed a law which would require a social worker, who has direct contact with a child, to be affected by the employee screening and disqualification procedures, but make no such requirement for the social worker's supervisor or the support staff. The social worker's supervisor directs the actions of the social worker and does have access to the Division of Youth Services' facilities where the minor children actually live. Likewise, the support staff also have access to the Division of Youth Services' facilities and they work closely with the social worker in providing care to the minor children entrusted to the Division. It is a principle of statutory construction that the General Assembly is presumed to have intended a logical and reasonable result, not an absurd one. Breeze v. Goldberg, 595 S.W.2d 381 (Mo.App., W.D. 1980) and Artophone Phone Corp. v. Coale, 345 Mo. 344, 133 S.W.2d 343 (1939).

Therefore, it is the opinion of this office that those provisions of S.B. 401 which are applicable to employees of providers are meant to be applicable to those employees of the Division of Youth Services which "do or will provide care to children directly or indirectly" and that depending on the facts and circumstances those employees who have no actual contact with client children may come within that definition.

6. Is the Department of Social Services and its various divisions immune from liability for discrimination

under Title VII of the Civil Rights Act for actions taken pursuant to S.B. 401?

It is not appropriate for this office to issue official opinions on whether certain immunities or defenses would be available in litigation. Our official opinion would serve no purpose because the issue is one exclusively for a court to decide.

7. During the period of time the Division of Family Services (DFS) is determining whether an exemption should be granted to an employee pursuant to Section 210.805.2, may the employee be terminated or placed on administrative leave?

   If the answer is "yes", is such termination or leave mandatory?

As described earlier, Section 210.805.2 provides for two types of exemptions from disqualification for employment. Section 210.805.4 prohibits the granting of any of these exemptions to a person who has a conviction for "acts which have been harmful to a child or which demonstrates [sic] a likelihood of harm to a child as defined in Section 210.800 of this act." Therefore, the exemptions may be granted only to those employees or potential employees who have committed noncriminal child abuse as described in Section 210.800(1). According to the first sentence of Section 210.805.2 which sets forth the first of the "exemptions", such employees or potential employees are exempt from "disqualification . . . for employment" "[a]after a review of the [criminal] record and before adverse action may be taken by the division, or by an employer or potential employer. . . ." This exemption continues until the division has "substantial and convincing evidence to support a reasonable belief that the applicant or employee or potential employee committed the alleged offense." Only then may "adverse action" in the form of "disqualification . . . for employment" occur. "Termination" is obviously such an "adverse action" and, therefore, cannot occur until the division has the requisite evidence.

Whether an employee can be put on administrative leave after the criminal review is finished and before the above determination is made by the division depends on whether the administrative leave constitutes "adverse action" or "disqualification for employment". If it does constitute such, the administrative leave cannot be forced upon the employee. However, a more specific answer cannot be provided in the abstract because the answer

would depend on the specific terms of the administrative leave and on the facts peculiar to each situation.

The second, or "good character", exemption comes into consideration once it is determined that an employee or potential employee has committed noncriminal child abuse as described in Section 210.800(1). Section 210.809 makes mandatory the denial of employment to such an individual. Therefore, he must not be allowed in the employ of the provider unless and until the division decides to grant the "good character" exemption which is set forth in the second and following sentence of Section 210.805.2. There is no language, as there was in the case of the first exemption, requiring that the good character exemption be granted before "adverse action" or "disqualification for employment" occurs. The removal of such an employee from the employ of the provider appears consistent with the fact that the investigation and decision-making process on whether this exemption should be granted could be a lengthy one given the number and type of factors which the statute requires be taken into consideration.

Since the affected employee or potential employee may return to work if he is granted the good character exemption, there arises a question of whether during the time that the applicability of the exemption is being determined his job must be completely terminated or whether he may be put on some type of "administrative leave". Section 210.809 is clear that a provider may not "employ" such a person as an "employee". The term "employees" is defined in Section 210.800(4) to "include staff, operators and volunteers who do or will provide care to children directly or indirectly". As long as the person who is disqualified from employment does not fall within that definition, the provider is in compliance with Section 210.809. Whether the provider fires the person or sends him home with or without pay or takes any other action, as long as the consequence is that the disqualified person no longer comes within the definition of employees, the provisions of Section 210.809 are complied with.

Therefore, it is the opinion of this office that, in regard to the first exemption in Section 210.805.2, the employee cannot be terminated from employment or have any other adverse action taken against him pursuant to Section 210.809 until the Division has the evidence required under Section 210.805.2. Furthermore, it is the opinion of this office that, in regard to the good character exemption, the provider has no choice but to take whatever action necessary to place the disqualified employee outside the scope of the definition of "employees" found in Section 210.800(4) until the good character exemption is granted.

8. In the case of licensed day care homes, do the provisions of Senate Bill 401 apply only to the licensed provider or do they extend to other household members living in the home?

Licensed day care homes are included within the definition of "provider", Section 210.800(5). Therefore, the task is to ascertain the extent of S.B. 401's coverage for a licensed day care home. Section 210.805.1 requires that the applicant for a license is within the coverage of S.B. 401. If the applicant is not an individual, then the chief executive officer or his equivalent shall be subject to coverage.

Additionally, all employees of a licensed day care home are covered by S.B. 401. Section 210.809 prohibits providers from employing any employee who has been determined to have committed certain acts harmful to the children. Section 210.826 also requires each provider to submit to the Division of Family Services data on each of their employees. S.B. 401 also provides a definition of "employees", namely, "staff, operators and volunteers who do or will provide care to children directly or indirectly". Section 210.800(4).

Unless, the household member living in the licensed day care home provided either direct or indirect care to the children, the provisions of S.B. 401 would not apply to him. The General Assembly has seen fit to limit the coverage of S.B. 401 by providing a definition of employees, Section 210.800(4), and of providers, Section 210.800(5). The definition of "employees" expressly refers to several classes of individuals. The definition of "provider" also expressly refers to certain classes of business entities and associations. The principle of statutory construction applicable here is that the express mention of one thing in the statute implies the exclusion of another. Harrison v. M.F.A. Mutual Insurance Company, 607 S.W.2d 137 (Mo. 1980). Where a statute enumerates the subjects upon which it operates, it is to be construed as excluding from its effect all those that are not expressly mentioned. Giloti v. Hamm-Singer Corp., 396 S.W.2d 711 (Mo. 1965).

The rationale for such a rule of statutory construction was set forth in Bauer v. Rutter, 256 S.W.2d 294 (St.L.Ct.App. 1953). The Court of Appeals reasoned that significance must be attached to every word in a statute or else some words will be without effect, and where there are limitations expressed in an act, a court will exclude all others so that the indicated purpose of the legislature is not defeated. Therefore, unless the

household member is the applicant for licensure or provides directly or indirectly for the care of children, he is not within the coverage of S.B. 401.

9. Does Senate Bill 401 relieve the Division of Family Services of the responsibility of following its own administrative rule regarding referral to the State Day Care Review Board or day care facilities in which abuse/neglect was substantiated?

The administrative rule which refers to the State Day Care Review Board is 13 CSR 40-62.041. The Day Care Licensing Review Board was reestablished pursuant to Section 207.020.11, RSMo 1978, which allows the Director of the Division of Family Services to appoint advisory committees. The licensing of child care centers is in Section 210.021 through .245, RSMo 1984 Supp. S.B. 401 does not refer to either 13 CSR 40-62.041 or Section 210.201 through .245.

The only provision in S.B. 401 which relates to the revocation of of a day care center's license is Section 210.830.2, which provides in part "if the division finds that a provider is in violation . . . it may seek, among other remedies, revocation of any license issued by the division . . ." Additionally, Section 210.830.1 allows the division to adopt rules necessary for the implementation of S.B. 401. No part of these provisions of S.B. 401 repeals or conflicts with 13 CSR 40-62.041. Therefore, the Division of Family Services is required to follow its own rules and regulations, and the exceptions to the regulations which are contained therein.

CONCLUSION

It is the opinion of this office concerning the screening of employees and potential employees of child care providers (S.B. 401, 83rd General Assembly, Sections 210.150 and 210.800 to 210.837, RSMo Supp. 1985) that hospitals and public schools do not come within the definition of "provider" and are not subject to the screening and disqualification requirements; a nationwide criminal review will be done on employees of providers; public elementary and secondary schools may request examinations of the central registry; exemptions may be granted to the employees of the divisions of Youth Services and Family Services; the screening and disqualification requirements apply to those employees of the Division of Youth Services who come within the definition of employees even though they have no actual contact with client children; whether an employee may be terminated or placed on administrative leave while the Division of

Family Services is determining the granting of exemptions depends on which exemption is being considered; in the case of licensed day care homes the provisions of S. B. 401 do not apply to members of the household living in the home unless they come within the definition of employees; and, S. B. 401 does not relieve the Division of Family Services of the responsibility of following its own administrative rule regarding referrals to the State Day Care Review Board.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

September 30, 1985

OPINION LETTER NO. 127-85

FILED
127

Carl M. Koupal, Jr., Director
Department of Economic Development
301 West High Street
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This letter is in response to your questions asking:

> Does the Missouri State Council on the Arts (MSCA) have legal authority, as defined by Article III, Section 38(a) of the Missouri Constitution, by Section 185.040 and 185.050 of the Revised Statutes of Missouri, and by Attorney General Opinion No. 155 (October 1976), to award fellowships to individual artists residing in Missouri for the public purpose of enabling artists to set aside time or to purchase materials to work on a specific project or to continue their work? In addition, does the MSCA have legal authority to contract with a public or private not-for-profit tax-exempt organization to administer a statewide fellowship program for individual artists?

Missouri Constitution, Article III, Section 38(a), provides:

> The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled

children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States.

Section 185.040, RSMo 1978,[1] states:

The duties of the council shall be:

(1) To stimulate and encourage throughout the state the study and presentation of the performing and fine arts and public interest and participation therein;

(2) To make such surveys as may be deemed advisable of public and private institutions engaged within the state in artistic and cultural activities, including, but not limited to, music, theater, dance, painting, sculpture, architecture, and allied arts and crafts, and to make recommendations concerning appropriate methods to encourage participation in and appreciation of the arts to meet the legitimate needs and aspirations of persons in all parts of the state;

(3) To take such steps as may be necessary and appropriate to encourage public interest in the cultural heritage of our state and to expand the state's cultural resources; and

(4) to encourage and assist freedom of artistic expression essential for the well-being of the arts.

Section 185.050 states:

---

[1]All statutory references are to RSMo 1978, unless otherwise indicated.

> The council is hereby authorized and empowered to hold public and private hearings, to enter into contracts, within the limit of funds available therefor, with individuals, organizations and institutions for services furthering the educational objectives of the council's programs; to enter into contracts, within the limit of funds available therefor, with local and regional associations for cooperative endeavors furthering the educational objectives of the council's programs; to accept gifts, contributions and bequests of unrestricted funds from individuals, foundations, corporations and other organizations or institutions for the purpose of furthering the educational objectives of the council's programs; to make and sign any agreements and to do and perform any acts that may be necessary to carry out the purposes of this chapter. The council may request from any department, division, board, bureau, commission or agency of the state such assistance and data as will enable it properly to carry out its powers and duties hereunder.

In Opinion No. 396, Dalton, 1964, copy enclosed, this office concluded that proposed legislation, which later became House Bill No. 42, 1965 Mo. Laws 314 (presently codified as Chapter 185, RSMo 1978), did not violate Missouri Constitution, Article III, Section 38(a). The reasoning for this conclusion was that whenever the expenditure of money was mentioned in what is now Chapter 185, RSMo 1978, the expenditure is in terms of payment for services. As stated in our 1964 opinion, "The proposed act does not permit grants, subsidies, gifts or scholarships to individual artists or to groups of artists, but authorizes payment for services and perhaps goods, ..." Id. at 4.

In Opinion No. 155, Sikes, 1976, copy enclosed, this office concluded that contracts between the Missouri State Council on the Arts (hereinafter sometimes referred to as "Council") and artists for workshops, lectures, demonstrations, performances, and art objects serve a public purpose and do not violate Missouri Constitution, Article III, Section 38(a).

In Opinion Letter No. 109, DeCoster, 1977, copy enclosed, this office emphasized that the statutory authority given to the Council is to contract, not to make grants. There must be some form of valuable consideration flowing from the contracting artist or artists to the Council. The import of our finding in our 1976

opinion that such contracts serve a public purpose is that no one has to ensure that the Council receives full and adequate consideration; that is, no one measures the monetary value of the art received by the Council and ensures that it is worth as much or more than the consideration the Council paid for it.

Accordingly, we conclude that the Council has no statutory authority to make grants or fellowships to artists. In light of our answer to your first question, we will not respond to your second question.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosures:

Opinion No. 396, Dalton, 1964
Opinion No. 155, Sikes, 1976
Opinion Letter No. 109, DeCoster, 1977

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

December 3, 1985

OPINION LETTER NO. 128-85

FILED
128

Carl M. Koupal, Jr., Director
Department of Economic Development
Truman State Office Building
Jefferson City, Missouri 65101

Dear Mr. Koupal:

This letter is in response to your question asking:

> May the State Board of Embalmers and Funeral Directors use fees collected pursuant to the provisions of Chapter 333 to fund the enforcement of Chapter 436 although some registrants under Chapter 436 are not licensed under Chapter 333?

Chapter 333, RSMo, provides for the licensing and regulation of the practice of funeral directing, the practice of embalming, and funeral establishments. Chapter 436, RSMo, regulates certain preneed funeral contracts. It is our understanding that one need not be licensed under Chapter 333, RSMo, in order to be a "seller" or "provider" of preneed funeral contracts under Chapter 436, RSMo.

Section 333.111.2, RSMo Supp. 1984, provides:

> 2. The board shall set the amount of the fees which this chapter authorizes and requires by rules and regulations promulgated pursuant to section 536.021, RSMo. The fees shall be set at a level to produce revenue which shall not substantially exceed the cost and expense of administering this chapter.

[Emphasis added.]

These fees are credited to the Board of Embalmers and Funeral Directors' Fund. Section 333.231.1, as enacted by Senate Bill No. 99, Eighty-Third General Assembly, First Regular Session.

Section 333.121.2(15), RSMo Supp. 1984, makes violation of Chapter 436, RSMo, cause for disciplinary action under Chapter 333, RSMo. Thus, moneys in the Board of Embalmers and Funeral Directors' Fund may be used to enforce Chapter 436, RSMo, incident to the administration of Chapter 333, RSMo; i.e., if the subject of the enforcement action is licensed or regulated under Chapter 333, RSMo, and a goal of the enforcement action is disciplinary action under Chapter 333, RSMo.

If the subject of the enforcement action is not licensed under Chapter 333, RSMo, then Section 333.111.2, RSMo Supp. 1984, prevents the use of moneys from the Board of Embalmers and Funeral Directors' Fund from being used to finance enforcement of Chapter 436, RSMo.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

September 4, 1985

OPINION LETTER NO. 129-85

Joseph J. O'Hara, Director
Department of Social Services
Broadway State Office Building
Post Office Box 1527
Jefferson City, Missouri 65102

FILED
129

Dear Mr. O'Hara:

This letter is in response to your question asking:

> Whether the Director of Youth Services, of the Department of Social Services, has authority to make payments to private individuals for damage caused by youth under custody of the Division of Youth Services and if so, whether that payment would establish the State's liability for future similar incidents.

Generally, tort claims against the State of Missouri are barred by the sovereign immunity statute. Section 537.600, RSMo 1978. Exceptions or waivers of sovereign immunity may only be made by the General Assembly, not by officers, agents or employees of the State of Missouri, e.g., the Director of Youth Services. Fowler v. Board of Regents for Central Missouri State University, 637 S.W.2d 352, 354 (Mo. App., W.D. 1982). Assuming that the injured party's claim does not come within an express statutory exception to or waiver of sovereign immunity, such claim is barred and the State of Missouri has no legal obligation to pay such.

In our earlier opinions, we concluded that gratuitous payments to injured parties constituted a prohibited grant for purposes of Missouri Constitution, Article III, Section 38(a). See Opinion No. 63, Speer, 1966; Opinion Letter No. 355, Walsh, 1965; Opinion Letter No. 153, Keane, 1965; and Opinion No. 98, Witte, 1951, copies enclosed.

Joseph J. O'Hara, Director

More recently, we concluded that payments for the purpose of crime victim compensation serve a public purpose and such payments can be provided for in generally applicable legislation. Opinion No. 60, Cairns, 1981, copy enclosed. We find no such general legislation authorizing the Director of Youth Services to grant public moneys to persons injured by people in the custody of the Division or declaring such payments to be for a public purpose; to the contrary, the sovereign immunity statute, Section 537.600, RSMo 1978, evidences a public policy of not paying such claims.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

Enclosures:

Opinion No. 63, Speer, 1966
Opinion Letter No. 355, Walsh, 1965
Opinion Letter No. 153, Keane, 1965
Opinion No. 98, Witte, 1951
Opinion No. 60, Cairns, 1981

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

September 3, 1985

OPINION LETTER NO. 132-85

The Honorable Jean H. Mathews
Representative, District 73
2620 North Waterford Drive
Florissant, Missouri 63033

FILED
132

Dear Representative Mathews:

This letter is in response to your question asking whether major case squad members have to be specified by name and approved by the governing body of the political subdivision.

Section 20 of the bill to which you refer provides in full:

> 1. Any county governing body by order and the governing body of any municipality by ordinance may agree to cooperate with one another in the formation of a "major case squad" for the purpose of intensive professional investigation of a certain individual crime which may occur in their general geographical area.
>
> 2. Expenses of a major case squad may be paid by the individual political subdivisions.
>
> 3. The major case squad shall operate and be activated upon the request of the county sheriff or police chief of the political subdivision where the crime occurred. The county presiding commissioners, county executive officers or mayors of the municipalities shall approve or refuse the request within twenty-four hours.
>
> 4. All members of any major case squad shall be duly authorized in advance by the

> governing body of the political subdivision and may function as a member of such a group if their political subdivision grants approval as required by subsection 3 of this section.
>
> 5. Notwithstanding other provisions of law to the contrary, whenever any peace officer is duly authorized as a member of a major case squad, he shall have the power to arrest anywhere within this state. This power shall only be exercised during the time the peace officer is an active member of an active major case squad and only within the scope of the investigation on which the squad is working.
>
> 6. Prior to the inititation [sic] of a major case squad investigation in a political subdivision other than where the crime occurred, a member of the major case squad shall notify the chief law enforcement officer of the political subdivision in which the investigation is to be conducted, or a designated agent thereof.

It is our view that the above provisions are plain and unambiguous with respect to the question you ask. Subsection 4 clearly requires that members of the squad be duly authorized in advance by the governing body. It is axiomatic that where there is no ambiguity we are required to give such provisions their plain and ordinary meaning. While the result may be rather burdensome, it cannot be said that it is absurd to the extent that such could not have been the legislative intent.

Therefore, it is our view that under Section 20 of House Committee Substitute for Senate Committee Substitute for Senate Bills Nos. 156, 14, 149, 155 & 181, Eighty-Third General Assembly, First Regular Session, members of the major case squad must be specifically authorized in advance by the governing body of the political subdivision.

We note that your correspondence refers to a home rule city. Whether the governing body of such a city may appoint members of the major case squad by resolution instead of by ordinance depends on the city charter provisions and possibly upon the provisions of city ordinances which are not before us and which we do not, generally, purport to interpret. However, it is our view that the governing body of a charter city may by ordinance, unless prohibited by charter, authorize the appointment of members of the major case squad by resolution of the governing body. See Article VI, Section 19(a), Missouri Constitution.

Certainly it may not be necessary to name specifically each major case squad member in the ordinance itself. However, each member must be authorized in advance. We are willing to discuss with the City Attorney the most desirable procedure under the present law.

Yours very truly,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

October 24, 1985

OPINION LETTER No. 136-85

Frederick Brunner, Director
Missouri Department of Natural Resources
1915 Southridge Drive
Jefferson City, Missouri 65101

Dear Dr. Brunner:

This letter is in response to the following question:

> Does a school district have the right to enter into a contract with the Department of Natural Resources to borrow money for energy conservation measures without the approval of [a] two-thirds majority of eligible voters under ... [Section] 164.231 [sic]. If so, may the loan funds be repaid with the revenues derived from energy cost savings which will be calculated annually.

As we understand the situation, you wish to know if constitutional legislation can be enacted that allows the Department of Natural Resources to lend money to school districts to be used on energy conservation projects. These loans would be secured solely by the energy cost savings created by the implementation of the energy conservation projects. House Bill No. 296, Eighty-Third General Assembly, First Regular Session, is mentioned as an example of what you have in mind. House Bill No. 296 failed to pass the General Assembly last session. You also state that the energy cost savings would, at least in part, be derived from local taxation; however, you state that if no energy cost savings are created by the energy conservation measures, there is no obligation on the part of the school district to repay the "loan".

Dr. Frederick Brunner

I.

School District Debts

Article VI, Section 26(a), Missouri Constitution, provides as follows:

> No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution. [Emphasis added.]

The First National Bank of Stoutland v. Stoutland School District R2, 319 S.W.2d 570, 573 (Mo. 1958), the court found the above-quoted constitutional provision to be a self-enforcing grant of power to school districts to incur indebtedness in an amount not exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years. This power to issue tax anticipation notes has been codified in Sections 165.131, RSMo Supp. 1984, and 165.141, RSMo 1978.

However, it appears that you are interested in whether school districts can issue long-term notes without the voter approval required by Article VI, Section 26(b), Missouri Constitution.

In Saleno v. City of Neosho, 127 Mo. 627, 30 S.W. 190, 192 (banc 1895), the court defined the term "debt" in a predecessor of Article VI, Section 26(a), Missouri Constitution, as follows:

> A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed.

In Bell v. City of Fayette, 325 Mo. 75, 28 S.W.2d 356 (banc 1930) the court held that an obligation payable from the savings created by the use of diesel engines did not create a "debt" in the constitutional sense, because the obligation was "a contingent liability which may or may not accrue." 28 S.W.2d at 362. Likewise, the obligation to repay moneys used to obtain energy cost savings equipment and facilities is conditional, in that the obligation is contingent upon the actual occurrence of

such energy cost savings. There is no unconditional obligation to pay tax moneys. There is no "debt" created within the meaning of Article VI, Section 26(a), Missouri Constitution.

Therefore, in the premises, voter approval under Article VI, Section 26(b) is not required.

II.

Department of Natural Resources Lending

Article III, Section 38(a), Missouri Constitution, provides in part: "The general assembly shall have no power to . . . authorize the lending of public credit, to any private person, association, or corporation, excepting . . . ". It has been held that a predecessor of this constitutional provision does not apply to public schools. State ex rel. Clark v. Gordon, 261 Mo. 631, 170 S.W. 892, 894-895 (banc 1914). We do not believe that there is a constitutional barrier to the Department of Natural Resources lending money to public schools; of course, there would have to be some kind of statutory authority authorizing the Department of Natural Resources to make these loans.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

November 15, 1985

OPINION LETTER NO. 140-85

The Honorable John D. Wiggins
Phelps County Prosecuting Attorney
Phelps County Courthouse
Rolla, Missouri 65401

Dear Mr. Wiggins:

This letter is in response to your question asking:

1. May the county continue to withhold a percentage of taxes collected for the benefit of our political subdivisions (under authority of Section 137.750, RSMo) in order to continue funding reassessment work.

2. May such funding continue through the voluntary contribution from political subdivisions made to the county for that purpose? If so, what authority authorizes such political subdivisions to make such contributions?

I.

Question 1

Section 137.720, RSMo Supp. 1984, provides:

> A percentage of all ad valorem property tax collections allocable to each taxing authority within the county and the county shall be deducted from the collections of taxes each year and shall

> be deposited into the assessment fund of the county as required under section 137.750. The percentage shall be one-half of one percent for all counties of the first and second class and cities not within a county and one percent for counties of the third and fourth class. The county shall bill any taxing authority collecting its own taxes. The county may also provide additional moneys for the fund. Every county shall provide all moneys necessary to assure that the fund is at least equal to the amount of moneys available for assessment purposes in the previous year. Any amount which is attributable to deductions under this section remaining in the fund each year after payment of all costs shall be paid to the taxing authority. [Emphasis added.]

Section 137.750.2(3), RSMo Supp. 1984, states in part:

> 2. A county ordered to perform a general reassessment by the commission or a court shall be reimbursed for all reasonable costs expended pursuant to a general reassessment plan approved by the commission as follows:
>
> . . .
>
> (3) . . . A percentage of all ad valorem property tax collections allocable to each taxing authority, except the state, based on the percentage basis determined as provided in this subdivision shall be deducted by the collector from the collections of taxes due on December thirty-first of that year.

The county assessment funds are established under Section 137.750.3, RSMo Supp. 1984, which states:

> 3. The governing body of any county which seeks reimbursement pursuant to chapter 137, or this section, shall establish a fund to be used exclusively for the purpose of funding the costs and expenses of the county or township assessors, and all funds so received shall be paid into the fund. [Emphasis added.]

We interpret your first question to be if a county has completed its most recent general reassessment under its approved plan, can the county continue to withhold moneys under Sections 137.720 and 137.750.2(3), RSMo Supp. 1984, and deposit these moneys in the county reassessment fund established under Section 137.750.3, RSMo Supp. 1984. Obviously, Section 137.720, RSMo Supp. 1984, has not been repealed and withholdings can be made under that statute for the purposes enumerated therein. The issue is whether moneys in the county reassessment fund may only be used to reimburse the county for reassessment expenses incurred under the reassessment plan (which amount would be zero (0) if the general reassessment plan has been completed), see Section 137.750.2, RSMo Supp. 1984, or whether moneys in the county reassessment fund may also be used "for the purpose of funding the costs and expenses of the county or township assessors, ...". Section 137.750.3, RSMo Supp. 1984.

Looking at the plain wording of the statute, we find that Section 137.720, RSMo Supp. 1984, allows counties to continue to withhold funds from taxing authorities for deposit in the county reassessment fund "to be used exclusively for the purpose of funding the costs and expenses of the county and township assessors, ..." even after the general reassessment plan has been completed.

The withholdings authorized by Section 137.750.2(3), RSMo Supp. 1984, on the other hand, are for the purpose of reimbursing the county for "all reasonable costs expended pursuant to a general reassessment plan approved by the commission ...". Accordingly, withholdings under Section 137.750.2(3), RSMo Supp. 1984, cannot continue after the general reassessment plan has been completed.

II.

Question 2

The second question asks whether voluntary contributions may be made by political subdivisions, in particular, six-director school districts, to the county for deposit in the reassessment fund.

Generally, the powers, duties, and obligations of school districts must be found within the limits of statutory provisions governing school districts. State ex rel. School District of Springfield R-12 v. Wickliffe, 650 S.W.2d 623, 625 (Mo. banc 1983). We have found no statute expressly or impliedly authorizing six-director school districts to make grants of money to counties for deposit in the county reassessment fund. Accordingly, we find that such grants are unauthorized. Cf. Enright v. Kansas City, 536 S.W.2d 17 (Mo. banc 1976). We note that State ex rel. Commissioners of the State Tax Commission v.

Davis, 621 S.W.2d 511 (Mo. banc 1981) shows that legislation authorizing such contributions would not violate certain provisions of the Missouri Constitution limiting the purposes for which school moneys may be spent.

Therefore we conclude: (1) counties can continue to withhold tax funds from political subdivisions under Section 137.720, RSMo Supp. 1984, for deposit in the county reassessment fund, Section 137.750.3, RSMo Supp. 1984, (2) that withholding under Section 137.750.2(3), RSMo Supp. 1984, ceases upon the completion of the general reassessment plan, and (3) six-director school districts do not have authority to grant school moneys to the county for reassessment purposes.

Very truly yours,

William L. Webster
Attorney General

DEPARTMENT OF PUBLIC SAFETY: WATER PATROL: Members of the Missouri State Water Patrol may randomly stop vessels on the waters of the State of Missouri for the purpose of checking registration papers and safety equipment without probable cause, except (1) prior to April 1, 1986, water patrolmen may not board vessels for inspection purposes during night-time hours, and (2) on or after April 1, 1986, water patrolmen may not board vessels for inspection purposes without probable cause to believe a provision of Chapter 306, RSMo, is being violated.

December 27, 1985

OPINION NO. 141-85

FILED
141

Richard C. Rice, Director
Department of Public Safety
Post Office Box 749
Jefferson City, Missouri 65102

Dear Mr. Rice:

This opinion is in response to your question asking:

> Is it lawful for a member of the Missouri State Water Patrol to stop a vessel on the waters of this state for the purpose of checking proper registration and safety equipment as required by Chapter 306, RSMo, without "probable cause"?

I.

Statutory Authority

Section 306.015, RSMo Supp. 1985 (effective April 1, 1986), requires the owners of "vessels", as defined in Section 306.010(5), RSMo Supp. 1984, kept, acquired, or brought into this state to cause them to be registered with the Missouri Department of Revenue, which issues certificates of title therefor. Section 306.020, RSMo 1978, requires vessels to be numbered, with certain exemptions found in Section 306.080, RSMo 1978, and Section 306.080, RSMo Supp. 1985 (effective April 1, 1986). Section 306.030.1, RSMo 1978, and Section 306.030.1, RSMo Supp. 1985 (effective April 1, 1986), require owners of vessels required to have numbers to file an application for a certificate of title, which is issued by the Missouri Department of Revenue.

Effective April 1, 1986, Section 306.030.1, RSMo Supp. 1985, provides that:

> The application shall include a provision stating that the applicant will consent to any inspection necessary to determine compliance with the provisions of this chapter and shall be signed by the owner of the vessel . . .[1]

Section 306.100, RSMo 1978, and Section 306.100, RSMo Supp. 1985 (effective April 1, 1986) establish certain safety equipment requirements for vessels.

Section 306.210, RSMo 1978, makes violations of Sections 306.030 and 306.100 misdemeanors. Section 306.165, RSMo 1978, and Section 306.165, RSMo Supp. 1985 (effective April 1, 1986), grant water patrolmen all the powers of peace officers to enforce the laws of the State of Missouri in certain designated areas. Section 306.200, RSMo 1978, grants all peace officers, including water patrolmen, the authority to enforce the provisions of Chapter 306, RSMo, and to arrest violators thereof.

Section 306.165, RSMo 1978, provides in part: "Each water patrolman may board any boat during daylight hours for the purpose of making any inspection necessary to determine compliance with the provisions of this chapter." (Emphasis added.) In Opinion No. 92-84, copy enclosed, this office concluded that the above-quoted statute did not grant water patrolmen the authority to board vessels during night-time hours.

Section 306.165, RSMo Supp. 1985 (effective April 1, 1986), provides in part: "Each water patrolman may board any watercraft at any time, with probable cause, for the purpose of making any inspection necessary to determine compliance with the provisions of this chapter." (Emphasis added.) We conclude that the above-quoted language only authorizes water patrolmen to board vessels with probable cause.

Your question asks about the authority of water patrolmen to stop vessels without probable cause. We conclude that water patrolmen, as peace officers, have the implied statutory authority to stop vessels without probable cause, as an incident to their power to enforce the provisions of Chapter 306, RSMo;

---

[1]In order for the consent provision in the application to be effective as a truly voluntary consent, it may be advisable for the Department of Public Safety to interpret this language as allowing one to refuse to consent to the inspection and also obtain registration papers.

provided, that the limitations in Sections 306.165, RSMo 1978, and 306.165, RSMo Supp. 1985 (effective April 1, 1986), may not be exceeded.

II.

Constitutional Authority

In Opinion No. 124, Wilson, 1979, copy enclosed, this office opined that water patrolmen may not randomly and arbitrarily stop watercraft without reasonable suspicion to inspect the boat for compliance with the provisions of Chapter 306, RSMo. Our 1979 opinion was based on Delaware v. Prouse, 440 U.S. 648 (1979). In Prouse the Court held that random and arbitrary stops of motor vehicles in order to check the driver's license and registration papers of the vehicle violated the Fourth and Fourteenth Amendments to the United States Constitution. In making this determination the Court balanced the state's interest in promoting the safe operation of motor vehicles by ensuring that such are operated by qualified drivers and that the vehicles have undergone an annual safety inspection evidenced by the vehicle registration against the intrusion caused by stopping drivers of automobiles when there is no observable indication that the vehicle is unsafe. The Court found that the marginal contribution to roadway safety caused by the random stops was outweighed by the unbridled discretionary intrusion upon the travelling public's expectation of privacy caused by such stops. The state's interest in promoting vehicle safety could be obtained more productively through alternative methods of enforcement, e.g., the fixed check point or roadblock.

At the time our 1979 opinion was rendered, we found no basis to distinguish boats from automobiles and concluded that Prouse prohibited water patrolmen from conducting random stops of boats in order to check registration papers and safety equipment.

In United States v. Villamonte-Marquez, 462 U.S. 579 (1983), on remand, 714 F.2d 428 (5th Cir. 1983), the issue was "whether the Fourth Amendment is offended when customs officials, acting pursuant to this statute and without any suspicion of wrongdoing, board for inspection of documents a vessel that is located in waters providing ready access to the open sea." 462 U.S. at 580-581.

The Court stated:

> Our focus in this area of Fourth Amendment law has been on the question of the "reasonableness" of the type of governmental intrusion involved. "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion

> on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Delaware v. Prouse, supra, at 654. See also Camara v. Municipal Court, 387 U.S. 523 (1967); Terry v. Ohio, 392 U.S. 1 (1968); Cady v. Dombrowski, 413 U.S. 433 (1973); United States v. Brignoni-Ponce, supra; United States v. Martinez-Fuerte, supra. It seems clear that if the customs officers in this case had stopped an automobile on a public highway near the border, rather than a vessel in a ship channel, the stop would have run afoul of the Fourth Amendment because of the absence of articulable suspicion. See United States v. Brignoni-Ponce, supra. But under the overarching principle of "reasonableness" embodied in the Fourth Amendment, we think that the important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area are sufficient to require a different result here.

462 U.S. at 588.

The Court distinguished vessels having access to the open seas from automobiles on the basis of two points: (1) that fixed checkpoints do not work with vessels with access to the open seas, and (2) that the documentation requirements for ocean-going vessels are more complex.

Vessels with access to the open seas may float around any checkpoint established; thus, fixed checkpoints do not work with respect to such vessels. The Court did note that "maritime commerce on the inland waters of the United States may funnel into rivers, canals, and the like, which are more analogous to roads and make a 'roadblock' approach more feasible, ...". 462 U.S. at 589. Missouri's waters are generally inland waters that may funnel into rivers, canals, etc., and which may be subject to "roadblock"; however, there may be areas where the "roadblock" approach is impractical. In these areas, random stops may be appropriate.

The second factor the Court looked to is the complexity of ocean-going vessel registration. There are generally no outwardly observable license plates or stickers on ocean-going vessels as there generally are on automobiles. The panoply of statutes and regulations governing maritime documentation was also found to be more extensive and complex than that required by automobiles. Missouri's regulations of vessels require the

vessel's identifying number to be displayed on each side of the bow of the vessel, Section 306.020, RSMo 1978, and no other number may be painted, attached, or otherwise displayed on either side of the bow of the motorboat, Section 306.040, RSMo 1978. We believe this is similar to the license plates or stickers on automobiles, even though these markings may be placed on the boat by the owner. See Villamonte-Marquez, 462 U.S. at 590. We also believe that Missouri's regulations relating to vessel documentation are substantially less complex than those applicable to ocean-going vessels, which may be of foreign registry. However, if the water patrolmen come across vessels of foreign registry, random stops of such to inspect their relatively complex registration papers may be in order.

Further guidance is given in State v. Casal, 410 So.2d 152 (Fla. 1982), on remand, Casal v. State, 411 So.2d 1040 (Fla. App. 1982), cert. granted, Florida v. Casal, 459 U.S. 821 (1982), cert. dismissed as improvidently granted it appearing that the judgment below rested on independent and adequate state grounds, 462 U.S. 637 (1983). In that case the Supreme Court of Florida weighed the state's interest in promoting boat safety against the intrusion caused by a "spot check" to inspect a registration certificate and found that the state's interest in promoting boat safety outweighed the intrusion caused by a spot check. Mainly, the court in Casal relied upon the inadequacy of fixed check points in policing boats and the fact that most maritime safety equipment, e.g., life jackets and fire extinguishers, are easily detachable, making periodic inspections inadequate to insure that such equipment is on board while the boat is in operation. Thus the Supreme Court of Florida held that state maritime officers need not have probable cause to stop a vessel for the limited purpose of checking fishing permits, registration certificates, and safety equipment. However, the court found that the subsequent search of the vessel in Casal was unreasonable and ordered the evidence suppressed.

In the order dismissing the writ of certiorari previously granted in Casal, which was handed down on the same date the Court handed down Villamonte-Marquez, 462 U.S. at 637, Chief Justice Burger indicated that the Fourth Amendment of the United States Constitution would not require the suppression of the evidence in Casal and pointed to independent state law that may have required such suppression, including a Florida statute permitting state marine patrol officers to board vessels for safety inspections only if there is consent or probable cause to believe a crime is being committed. Cf. Section 306.165, RSMo Supp. 1985 (effective April 1, 1986).

In balancing the State of Missouri's interest in promoting the safe operation of vessels and enforcing its laws upon the waters of the State of Missouri against the intrusion caused by random stops of vessels for the purpose of inspecting safety

equipment and registration papers, we find that the State of Missouri's interests outweigh the damage to privacy caused by such random stops. In particular, we note that fixed check points are often not adequate with regard to vessels, because there often are not "channels" or roads on the water. We also note that certain of Missouri's safety equipment requirements, such as personal flotation devices, fire extinguishers and sounding devices, Sections 306.100.7-.14, RSMo 1978, and Section 306.100.7-.14, RSMo Supp. 1985 (effective April 1, 1986), may only be adequately enforced while the vessel is being operated.

Accordingly, we find nothing in the Fourth Amendment to the United States Constitution, as is incorporated into the Fourteenth Amendment thereof, prohibiting water patrolmen from randomly stopping vessels for the purpose of inspecting safety equipment and registration papers. Anything to the contrary in Opinion No. 124, Wilson, 1979, should be disregarded, and that opinion is hereby withdrawn. As the search and seizure provision of the Missouri Constitution, Article I, Section 15, Missouri Constitution, is coextensive with the United States Constitution, see State v. Jefferson, 391 S.W.2d 885, 888 (Mo. 1965), we find it unnecessary to specifically examine Missouri law on this question.

CONCLUSION

It is the opinion of this office that members of the Missouri State Water Patrol may randomly stop vessels on the waters of the State of Missouri for the purpose of checking registration papers and safety equipment without probable cause, except (1) prior to April 1, 1986, water patrolmen may not board vessels for inspection purposes during night-time hours, and (2) on or after April 1, 1986, water patrolmen may not board vessels for inspection purposes without probable cause to believe a provision of Chapter 306, RSMo, is being violated.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Enclosures:

Opinion No. 92-84
Opinion No. 124, Wilson, 1979

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

November 8, 1985

OPINION LETTER NO. 144-85

The Honorable Fred Williams
State Representative
5852 Julian
St. Louis, Missouri 63112

Dear Representative Williams:

This letter is in response to your request for an opinion as to whether the practice of the state Department of Revenue in furnishing certain equipment, supplies, and personnel to its fee agents is in violation of Article III, Section 38(a) of the Missouri Constitution, which forbids the granting of public money or property to any private person, association or corporation.

The practice you speak of occurs in conjunction with the operation of an office by a fee agent appointed by the Director of Revenue pursuant to Section 136.055, RSMo 1984 Supp., for the purpose of carrying out certain duties of the Director. Among these are the sale of motor vehicle and driver's licenses and the collection of sales and use tax on motor vehicles and trailers. The fee agent is not an employee of the State of Missouri and draws no salary. Rather, the agent charges his customers a stated statutory fee for each transaction. See, Section 136.055, RSMo 1984 Supp.

Attached is a copy of a typical agency contract between a fee agent and the Director of Revenue outlining the fee agent's responsibilities when acting on behalf of the Director of Revenue. On page 3, paragraph 5, of the document, the Director agrees to furnish all necessary validation equipment, official forms, licenses, vision test equipment, and photographic equipment. Further, it is our understanding that the Department of Revenue furnishes postage and personnel to run the vision testing equipment used in conjunction with the issuance of driver's licenses. The money necessary to provide such service by the Department of Revenue is contained in the Director's yearly budget and is appropriated on an annual basis

by the Legislature. For example, see H.B. 4, 83rd General Assembly, First Regular Session, which appropriated the funds necessary to finance these operations for the fiscal year beginning July 1, 1985.

Under these circumstances, it cannot be argued that the Missouri Department of Revenue has violated Article III, Section 38(a) of the Missouri Constitution. That section prohibits the General Assembly from lending or granting public money or property to private entities. Obviously, the intent behind this provision is to prevent the use of public money for a non-public purpose. Such is not the case here. The equipment, supplies, and personnel concerned are not being provided to a private entity but rather to a statutory agent of the State of Missouri for the purpose of carrying out certain statutory duties delegated to one of its officials, the Missouri Director of Revenue.

In our opinion, the practice of the Missouri Department of Revenue in furnishing its fee agents with certain equipment, supplies and personnel does not violate the state constitutional provisions against the granting of public money or property to any private person, association or corporation (Article III, Section 38(a)).

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

Attachment

MISSOURI DEPARTMENT OF REVENUE
POST OFFICE BOX 311
JEFFERSON CITY
65105

JOHN ASHCROFT
GOVERNOR

PAUL S. McNEILL, JR.
DIRECTOR OF REVENUE

AGENCY CONTRACT

This Agency Contract entered into by and between _____ _____ (hereinafter referred to as the Fee Agent) and the Director of the Department of Revenue for the State of Missouri and his successors in office (hereinafter referred to as the Director of Revenue).

This appointment shall become effective at 12:01 A.M. on the _____ day of _____, 19___.

In exchange for an appointment as a Fee Agent by the Director of Revenue pursuant to Section 136.055, RSMo 1978, as amended, the Fee Agent agrees to the following terms and conditions.

1. The Fee Agent will act on behalf of the Director of Revenue for:

   A. The sale of motor vehicle, trailer, chauffeur, and operator licenses, and for the sale of nondriver's identification cards (Chapters 301 and 302, RSMo 1978, as amended);

   B. The collection of motor vehicle, trailer, and outboard motor title and license fees and penalties (Chapter 301, RSMo 1978, as amended);

   C. The collection of state sales and use tax (Chapters 144 and 301, RSMo 1978, as amended);

   D. The collection of city and/or county sales tax (Chapter 94, RSMo 1978, as amended);

   E. The collection of motorboat title and license fees (Chapter 306, RSMo 1978, as amended).

2. The Fee Agent is responsible to provide:

   A. Office space, office equipment and fixtures, and hours of operation, all subject to the approval of, and the continuing supervision of, the Director of Revenue as being adequate to perform the services herein stated.

   B. Adequate parking facilities for customers.

C. Adequate staff to promptly and efficiently care for the demands of business of the Fee Agent and to perform the services herein stated.

D. Adequate security for all license plates, permits and documents consigned to the Fee Agent.

E. A daily deposit to the credit of the State Treasurer of each day's collection of motor vehicle, drivers license and marine registration, with deposit slips forwarded to the Department of Revenue within 48 hours after the close of business.

F. A daily deposit to the credit of the Department of Revenue of each day's collection of city and/or county sales tax, with deposit slips forwarded to the Department of Revenue within 48 hours after the close of business.

G. A daily business register and summary which, with all substantiating documents, are to be forwarded to the Department of Revenue within 48 hours after the close of business.

H. Proof of the posting of a surety bond as part of the Fee Agent Group Bond Program for an amount deemed sufficient by the Director of Revenue to cover the collections of the fee office (generally computed for an average ten (10) day period).

I. A daily accounting of inventory expended and on hand, together with such exceptions as missing, defective, or incomplete sets of plates and/or tabs.

J. Personal attention and supervision of employees to ensure proper understanding of laws and procedures, and maintain a high level of courteous, efficient service to the public.

K. The maintenance of a Notary Public service in the Fee Agent's office for which no charge shall be made.

L. Maintenance of a copy of the statutes relating to the registration of motor vehicles, outboard motors, state sales and use taxes, city and/or county tax and the registration of motorboats in the Fee Agent's office.

3. The Fee Agent is expected to become completely familiar with each of the applicable Missouri statutes.

4. The Fee Agent is solely responsible for any uncollectable checks tendered in payment for licenses, fees, sales and use taxes, and city and/or county taxes.

5. The Director of Revenue agrees to furnish all necessary validation equipment, official forms, licenses, vision test equipment, and photographic equipment.

6. The Director of Revenue may schedule annual formal training for each Fee Agent in Jefferson City, or in a mutually agreeable location, to last for a period of up to seven (7) days during which time travel, lodging, and meal expenses of the Fee Agent are at the expense of the Fee Agent.

7. In performance of the above duties, the Fee Agent is entitled to collect from the party requiring services, a set fee, per transaction, as compensation in full for all services rendered as defined in Section 136.055, RSMo as amended.

8. In those instances where the Fee Agent is a member or representative of an organization (whether governmental or private, whether or not incorporated, and whether or not operated for profit), the Fee Agent shall be personally responsible and liable for the performance of the terms and conditions required of a Fee Agent by this contract or by statute.

9. It is understood and agreed that the Fee Agent serves solely at the pleasure of the Director of Revenue and may be dismissed any time for any reason.

Signed:

_____
Fee Agent

STATE OF MISSOURI)
) SS
COUNTY OF _____)

Before me personally appeared _____ this _____day of _____, 19___, and offered his or her signature to this contract.

My Commission Expires:

_____

Signed:

_____
Director of Revenue by his Agent (Field Operations Bureau Manager)

STATE OF MISSOURI)
) SS
COUNTY OF COLE)

Before me personally appeared _____this _____day of _____, 19___, and offered his or her signature to this contract.

My Commission Expires:

_____

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

October 23, 1985

OPINION LETTER NO. 145-85

John G. Meyer
Prosecuting Attorney, Perry County
17 North Main Street
Perryville, Missouri 63775

Dear Mr. Meyer:

This letter is in response to your question asking:

> May a county governing body, under Section 221.105 RSMo charge a municipality within the county limits or another county per diem costs for the incarceration of prisoners in excess of the charges allowable to the state, to-wit: $8.00 per day per person?

Section 479.180, RSMo 1978, states:

> If a municipality has no suitable and safe place of confinement, the defendant may be committed to the county jail by the judge, and it shall be the duty of the sheriff, if space for the prisoner is available in the county jail, upon receipt of a warrant of commitment from the judge to receive and safely keep such prisoner until discharged by due process of law. The municipality shall pay the board of such prisoner at the same rate as may now or hereafter be allowed by law to such sheriff for the keeping of other prisoners in his custody.

(Emphasis added.)

John G. Meyer

Section 479.180, RSMo 1978, was last reenacted as part of the Court Reform and Revision Act of 1978, House Bill 1634, 1978 Mo. Laws 696, 887. The relevant language of the 1978 enactment was carried forward from Section 98.010, RSMo 1969.

Section 221.105, RSMo Supp. 1984, states:

> 1. The governing body of any county and of any city not within a county shall fix the amount to be expended for the cost of incarceration of prisoners confined in jails or medium security institutions. The per diem cost of incarceration of these prisoners chargeable by the law to the state, shall be determined, subject to the review and approval of the office of administration.
>
> 2. When the final determination of any criminal prosecution shall be such as to render the state liable for costs under existing laws, it shall be the duty of the sheriff to certify to the clerk of the circuit court or court of common pleas in which the case was determined the total number of days any prisoner who was a party in such case remained in the county jail. It shall be the duty of the county court to supply the cost per diem for county prisons to the clerk of the circuit court on the first day of each year, and thereafter whenever the amount may be changed. It shall then be the duty of the clerk of the court in which the case was determined to include in the bill of cost against the state.
>
> 3. The actual costs chargeable to the state shall be seventy-five percent of the allowable per diem cost or eight dollars per day per person, whichever is less.

Section 221.105, RSMo Supp. 1984, originated in Senate Committee Substitute for House Bill 1130, 1976 Mo. Laws 686, and repealed Section 221.090, RSMo Supp. 1975. Prior to 1976, the repealed statute required the county court

to pay the sheriff his actual and necessary costs of incarcerating prisoners. See Opinion No. 203, Fritz, 1965.

It would appear that the language in what is now Section 479.180, RSMo 1978, referring to the sheriff's rate for keeping prisoners originally referred to the now repealed formula in Section 221.090, RSMo (repealed), allowing the sheriff to recover his actual and necessary costs.

The 1976 legislation resulting in what is now Section 221.105, RSMo Supp. 1984, replaces the "actual and necessary costs" formula with the following: First, subsection 1 of this statute requires the governing body of any county and the City of St. Louis to fix the amount to be expended for the cost of incarceration of prisoners -- the regular per diem costs. Second, Subsection 1 of the statute also requires the governing body of the county or the City of St. Louis to determine the per diem cost of incarceration chargeable to the state, which is subject to review and approval by the Office of Administration. Subsection 3 of the statute limits the costs chargeable to the state to seventy-five percent (75%) of the "regular" per diem cost, or eight dollars ($8.00), whichever is less.

Thus, Section 221.105, RSMo Supp. 1984, requires he establishment of two per diem rates for the costs of incarceration -- "regular" rate and a "state" rate. We believe the "regular" rate should be used for purposes of Section 479.180, RSMo 1978. See, e.g., Section 221.260, RSMo 1978 (costs to be charged for inter-county prisoner transfers); Section 221.290, RSMo 1978 (costs to be charged the United States for use of county jails). Only the State of Missouri is benefited by the "state rate" calculated under subsections 1 and 3 of Section 221.105, RSMo Supp. 1984.

Therefore, it is our view that Section 479.180, RSMo 1978, allows counties to charge cities for the costs of incarcerating municipal prisoners at the rate determined under subsection 1 of Section 221.105, RSMo Supp. 1984, without regard to the limitations on charges to the state contained in subsection 3 of Section 221.105, RSMo Supp. 1984.

Very truly yours,

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY

65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

December 17, 1985

OPINION LETTER NO. 149-85

FILED
149

The Honorable Margaret Kelly, CPA
Missouri State Auditor
Truman State Office Building, Eighth Floor
Jefferson City, Missouri 65101

Dear Mrs. Kelly:

This letter is in response to your question asking:

> Should the state auditor register a proposed $350,000 general obligation school bond dated August 1, 1985 of the Fredericktown Reorganized School District No. R-I of Madison County, pursuant to Section 108.240, RSMo Cum. Supp. 1984?

The facts show that the Official Ballot approved by more than two-thirds of the voters of the Fredericktown Reorganized School District No. R-I at a special school bond election held on June 4, 1985, included the following language: "The above proposition will not require a tax increase." The only substantial question raised is the propriety of this language on the ballot.

The above-quoted sentence does not appear in the recitation of the Official Ballot and Notice of Special School Bond Election in the minutes of the special meeting of the Board of Education of the Fredericktown Reorganized School District No. R-I of Madison County, Missouri, held on April 5, 1985. However, this language appeared in the publication of the Notice and on the Official Ballot.

We are informed that the New Era Bank of Madison County, Fredericktown, Missouri, will purchase the three hundred fifty thousand dollars ($350,000) bearer bond, and that the school district will satisfy the bond the day following its delivery to the bank. The funds used to satisfy this bond will come from funds already available in the school district's debt service fund. It appears that this surplus was generated to satisfy general obligation bonds dated October 1, 1973.

In Northern Trust Company v. City of Independence, 526 S.W.2d 825 (Mo. banc 1975) the City Council of the City of Independence, Missouri, included language in a ballot respecting general obligation bonds stating: "'These general obligation bonds will be payable first from the City-wide sales tax approved by the voters on October 9, 1973.'" 526 S.W.2d at 826. The court first considered whether the insertion of this language converted the bonds from general obligaton bonds to limited obligation bonds. General obligation bonds provide for an ad valorem tax sufficient to pay the interest and principal of the indebtedness as they fall due. Article VI, Section 26(f), Missouri Constitution. The court concluded that the bonds at issue were general obligation bonds and the language inserted in the ballot was not inconsistent with Article VI, Section 26(f), Missouri Constitution.

The court then examined the question whether the voters were mislead or deceived by the insertion of the offending language. The court found that this language was not misleading, because the voters were not told that ad valorem taxes would not be levied to satisfy the bonds or that the sales tax would exist for a definite period of time. However, the court did not express approval of the practice of inserting language on bond issue ballots, stating: "Such similar language should not be inserted in instructions to the voters. It has no place therein and political subdivisions would be well advised not to follow the practice in the future." 526 S.W.2d at 832. See also Nothern Trust Company, 526 S.W.2d at 833-834 (Bardgett, J., concurring).

In these circumstances, we find the insertion of the words, "The above proposition will not require a tax increase.", in the ballot to be factually correct and not misleading. The bond in question will be satisfied within days of its delivery to the purchaser. Thus, no tax increase will occur. Accordingly, we believe that if the bond complies with all the other conditions of the laws for purposes of § 108.240.1(1), RSMo Supp. 1984, the Missouri State Auditor should register the bond.

We also note that Beatty v. Metropolitan St. Louis Sewer District, No. 66779 (Mo. banc November 21, 1985) (may be subject to motion for rehearing) held that an action involving the wording of a ballot proposition is cognizable only in an election contest, which has a thirty (30) days statute of limitations

which has been exceeded in this instance. See Section 115.577, RSMo 1978. In light of our conclusion, we need not decide whether the Missouri State Auditor's review for compliance with all conditions of the laws under § 108.240.1(1), RSMo Supp. 1984, is obviated by the running of the statute of limitations on election contests.

We caution, however, against the insertion of propaganda on bond issue ballots in the future; this practice is not to be condoned. Northern Trust Company, 526 S.W.2d at 832; 526 S.W.2d at 833-834 (Bardgett, J., concurring).

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

WILLIAM L. WEBSTER
ATTORNEY GENERAL

P. O. Box 899
(314) 751-3321

December 27, 1985

OPINION LETTER NO. 170-85

FILED
170

The Honorable Roy Blunt
Secretary of State
Office of Secretary of State
State Capitol Building, Room 208
Post Office Box 778
Jefferson City, Missouri 65102

Dear Secretary Blunt:

This letter is in response to your request for our review under Sections 116.332, and 116.334, RSMo Supp. 1985, for sufficiency as to form of petitions relating to the election of the Governor and Lieutenant Governor and of members of the House of Representatives. We conclude that the two petitions must be rejected.

I.

Lack of Notice

Missouri Constitution, Article III, Section 50 requires an initiative petition proposing a constitutional amendment to include the full text of the measure so proposed. Judicial interpretation of this provision requires that notice be given to the voters of the existing constitutional provisions that may be amended or impliedly repealed if the proposed amendment is adopted. See, e.g., Buchanan v. Kirkpatrick, 615 S.W.2d 6, 14-15 (Mo. banc 1981). The enclosed initiative petitions contain no such notice.

II.

Nonconformance with Section 116.040, RSMo Supp. 1984

Section 116.040, RSMo Supp. 1984, establishes the form of each page of an initiative petition; this form must be substantially complied with. Part of this form states:

> It is a class A misdemeanor for anyone to sign any initiative petition with any name other than his own, or knowingly to sign his name more than once for the same measure for the same election, or to sign a petition when he knows he is not a registered voter.

This paragraph is missing from the enclosed sample initiative petition page. Also, only one sample initiative petition page was submitted, although there appear to be two initiative petitions contemplated by matter submitted.

III.

Lack of Numbering

The Committee on Legislative Research has been granted authority to number statutes. Section 3.050, RSMo 1978. The Committee has not been given authority to number constitutional amendments. The proposed constitutional amendments do not state which article of the Constitution of Missouri they purport to amend, nor do they assign a section number to the amendments. The proposed amendments should indicate the article and section of the Constitution of Missouri they purport to enact.

Due to the limited amount of time allowed for this review under Section 116.334.1, RSMo Supp. 1985, please understand that this review is not exhaustive and that you and your staff may find other deficiencies in these petitions, and other deficiencies may exist.

Very truly yours,

William L. Webster

WILLIAM L. WEBSTER
Attorney General